TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 310.

THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION, APPELLANT,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ILLINOIS.

FILED DECEMBER 8, 1915.

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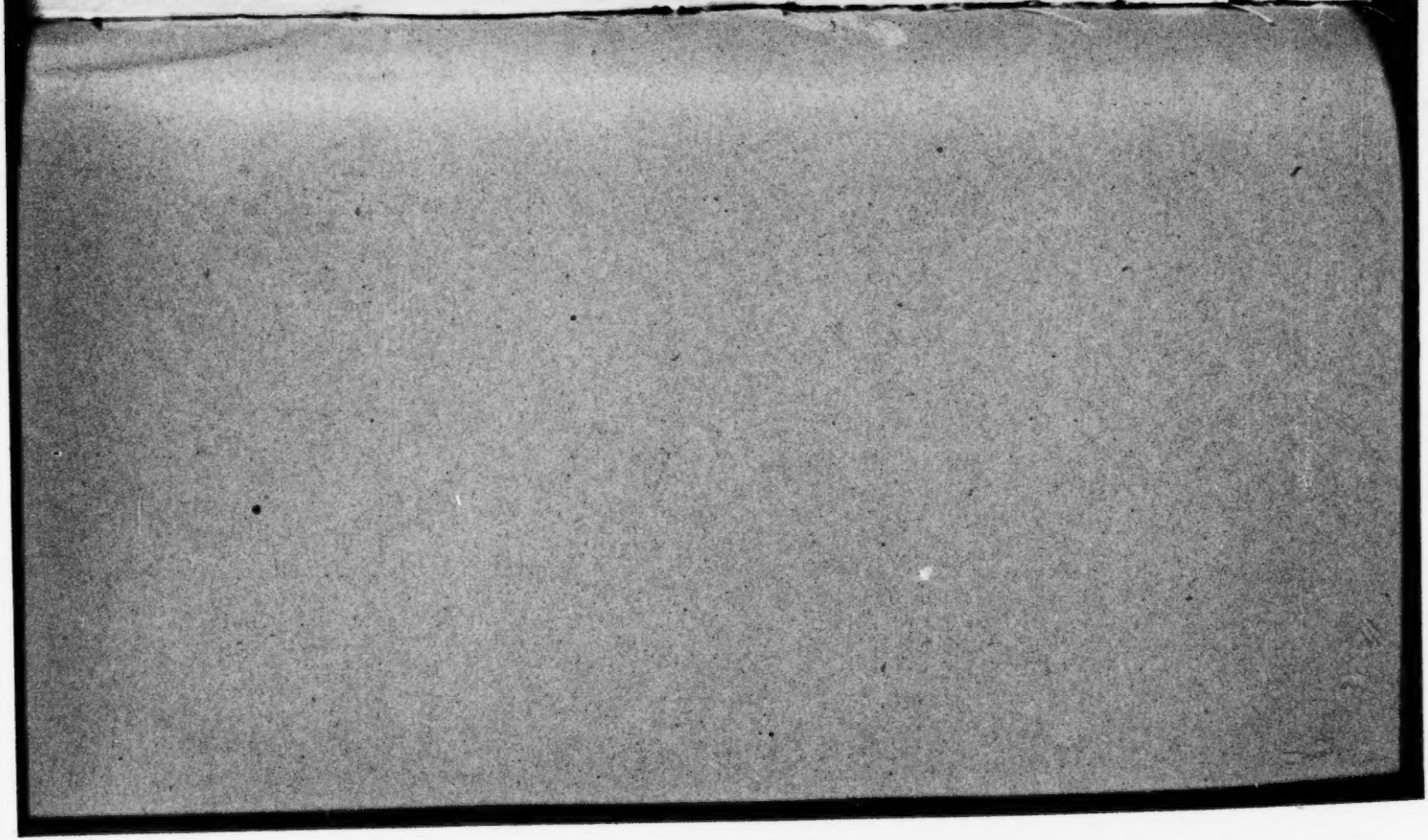

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INDEX.

a *Pleas in the District Court of the United States of America, within and for the Eastern District of Illinois, held at the United States courthouse, in the city of Danville, in said district, on Tuesday, the twenty-eighth day of September, in the year of our Lord one thousand nine hundred fifteen, and of our independence the one hundred fortieth.*

Present: Honorable Francis E. Baker, United States Circuit Judge, Seventh Judicial Circuit: Honorable J. Otis Humphrey, United States District Judge, Southern District of Illinois: Honorable Francis M. Wright, United States District Judge, Eastern District of Illinois.

b Be it remembered that heretofore—to wit, on the 7th day of September, A. D. 1915—there was filed in the office of the clerk of said court a petition by the Illinois Central Railroad Company against the United States of America, which said petition was and is in the words and figures following, to wit:

1 In the District Court of the United States, Eastern District of Illinois.

ILLINOIS CENTRAL RAILROAD COMPANY, PETITIONER, *vs.* UNITED STATES OF AMERICA, RESPONDENT.	In equity.

Petition.

To the Honorable Judges of the District Court of the United States in and for the Eastern District of Illinois.

Your petitioner, Illinois Central Railroad Company, a corporation, would most respectfully represent and show unto the court as follows:

1. Your petitioner is a corporation, chartered as a railroad company by the Legislature of the State of Illinois, and is domiciled and doing business in said State as a common carrier of freight and passengers.

2. That during the year 1911, and prior to that time, and subsequent thereto continuously to the present time, your petitioner maintained and operated, among other lines, a line of railway extended from Carbondale, in Jackson County, Illinois, and Duquoin, in Perry County, Illinois, through the said counties of Jackson and Perry and the counties of Randolph and St. Clair, in the State of
2 Illinois, to East St. Louis, Illinois, over which it transported freight and passengers in both intrastate and interstate commerce.

3. That among other commodities so transported on said line was coal, which during the years 1911, 1912, and 1913 was shipped by producers thereof located on said line of railway on through rates established by your petitioner and connecting carriers to St. Louis

and other destinations in Missouri and to points in the States of Iowa, Nebraska, Minnesota, South Dakota, and other States, all in interstate commerce.

4. Your petitioner would further show that the Vulcan Coal and Mining Company is a corporation organized and doing business under the laws of the State of Illinois and has its legal domicile in Belleville, St. Clair County, Illinois. The Groom Coal Company is a corporation organized and doing business under the laws of the State of Illinois and has its legal residence at Belleville, in St. Clair County, Illinois. The St. Louis-Coulterville Coal Company is a corportation organized and doing business under the laws of the State of Illinois and has its legal domicile at Belleville, in St. Clair County, Illinois.

5. On or about September 25th, 1913, the said Vulcan Coal and Mining Company, the said St. Louis-Coulterville Coal Company, and the said Groom Coal Company each filed its respective petition before the Intersate Commerce Commission, in each of which said petitions your petitioner herein was the sole respondent, in each and all of which said petitions the Interstate Commerce Commission was asked to assess damages against your petitioner for an alleged failure to supply a sufficient quantity of coal cars for the shipping needs of the said Vulcan Coal and Mining Company, the said
3 St. Louis-Coulterville Coal Company, and the said Groom Coal Company during the periods in the said petitions mentioned. A copy of the said petition filed by the said Vulcan Coal and Mining Company before the Interstate Commerce Commission is hereto appended, marked "Exhibit A," and is asked to be taken as part of this petition; a copy of the said petition of the said St. Louis-Coulterville Coal Company before the Interstate Commerce Commission is hereto appended, marked "Exhibit B," and is asked to be taken as part of this petition; a copy of the said petition of the said Groom Coal Company before the Interstate Commerce Commission is hereto appended, marked "Exhibit C," and is asked to be taken as part of this petition.

6. The said petitions, "Exhibits A, B, and C" hereto, were all received by the Interstate Commerce Commission, and since they were similar in language, and since the issues both of law and fact presented by each were all practically identical, the several petitions were, by the Interstate Commerce Commission, treated substantially as presenting but a single complaint and were so numbered on the docket of the Interstate Commerce Commission, the complaint of the Vulcan Coal and Mining Company being designated as No. 6128, the complaint of the St. Louis-Coulterville Coal Company being designated as No. 6128 Sub-No. 1, and the complaint of the Groom Coal Company being designated as No. 6128 Sub-No. 2. Thereafter, and in all the proceedings before the said commissions, these three complaints were treated and disposed of together by one report and order.

7. Upon the filing of these said complaints before the Interstate Commerce Commission your petitioner filed its answer to each of the said complaints as required by the rules of the said commission, in each of which said answers your petitioner expressly denied that the said commission had any jurisdiction to award dam-
4 ages against your petitioner, for a failure to furnish coal cars, averring the exclusive jurisdiction in actions of this character to be in the courts. Each of the said answers so filed by petitioner before the said commission contains a paragraph as follows:

"Insofar as this complaint challenges the sufficiency of the coal car supply of this respondent and insofar as this complaint demands damages on account of any alleged failure on the part of this respondent to furnish the petitioner equipment, this respondent avers that this honorable commission is without jurisdiction in the premises and that all actions of this character are committed to the courts."

8. In due course, a hearing was had by the Interstate Commerce Commission upon the said complaints, and at said hearing your petitioner, respondent in said complaints before the said commission, objected to any further procedure on the part of the said commission in the matter presented by the said complaints on the ground that the said commission was without jurisdiction at least as to so much of the said complaints as dealt only with damages resulting from the alleged failure on petitioner's part to supply coal cars as ordered. And your petitioner seasonably moved that so much of the said complaints as dealt with the demand for such damages be by the said commission dismissed. Pursuant to the order of the said commission, thereafter—to wit, on the 9th day of April, 1914—the said causes were argued by counsel before the said commission at its office in the city of Washington, D. C.

9. That at said argument before the said commission, it was expressly declared by counsel for each and all of the said complainants, to wit, the Vulcan Coal and Mining Company, the St. Louis-Coulterville Coal Company, and the Groom Coal Company,
5 that so much of the said complaints as charged any undue and unlawful discrimination on the part of petitioner in distributing coal cars was dismissed, and it was then and there expressly stipulated of record that the said complaints and each of them should be considered as so amended as to omit all charges of undue and unlawful discrimination; and thereafter the said causes proceeded upon the sole issue of damages for alleged failure to furnish cars upon demand.

10. Your petitioner would further show that on January 30th, 1915, a majority of said commission, to wit, four members thereof, filed a report in the said causes No. 6128, 6128 Sub-No. 1, and 6128 Sub-No. 2, holding that the said commission had jurisdiction to consider the said complaints and award whatever damages might be proven. Three of the seven members of the said commission—to wit,

Commissioners Clark, Harlan, and Clements—filed a dissenting report in these causes, contending that the commission was without jurisdiction in the premises. A copy of the said majority and minority reports is hereto appended, marked "Exhibit D," and is asked to be taken as part of this petition.

11. That pursuant to the rules of the said commission, your petitioner filed with the said commission its petition for a rehearing in the said causes, setting out as the rules provide a brief statement of the grounds of error in the said report. This petition was by the said commission, on the 9th day of July, 1915, overruled and denied. Your petitioner makes special reference to its petition asking the said commission for a rehearing in the said causes and will produce a copy of the same upon the hearing of this petition, if necessary.

6 12. Your petitioner further shows that after the said petition for a rehearing had been denied, to wit, on the 18th day of August, 1915, the said commission entered its order assigning the said causes for further hearing upon the issue of reparation, such further hearing to be held in the city of St. Louis, Missouri, on October 1st, 1915. This order is in the following words and figures, to wit:

"No. 6128—Vulcan Coal and Mining Company vs. Illinois Central Railroad Company. No. 6128 Sub-No. 1—St. Louis-Coulterville Coal Company vs. Illinois Central Railroad Company. No. 6128 Sub-No. 2—Groom Coal Company vs. Illinois Central Railroad Company.

"The above-entitled cases are assigned for hearing October 1, 1915, ten o'clock a. m., at Hotel Jefferson, St. Louis, Mo., before Examiner Wilson.

"By the commission.

"(Signed) GEORGE B. MCGINTY,
"*Secretary.*"

13. That pursuant to this order, unless relief is granted by this court, hte said commission will on said date, to wit, October 1st, 1915, proceed to take further testimony in the said causes, with a view of ascertaining whether damages have been sustained by the said parties filing the said complaints and with the further view to assessing such damages, if any be shown, and to making an award of reparation therefor in favor of complainants in the said complaints before the said commission.

7 14. Your petitioner further shows that the said commission is wholly without jurisdiction in the premises, and is not vested under the laws of the United States with authority to entertain complaints of this character, or to make any order or take any action whatever with respect thereto, and especially is without jurisdiction, in the absence of any charge of discrimination or any attack upon the method of distributing cars, to award damages against your petitioner for failing to furnish cars when demanded.

15. Your petitioner further shows that unless the order of the said commission setting down this cause for further hearing on this issue of damages be cancelled, annulled, and set aside, and unless further action in the premises by the said commission be enjoined and restrained, your petitioner will be compelled to attend the said hearing at St. Louis, Missouri, on October 1st, 1915, will be put to great expense and trouble to make proper defense thereto, and in all probability orders will be entered by the said commission awarding reparation to the said complainants in the said complaints before the said commission. Hereafter petitioner will be forced to defend at great trouble and expense three separate and several suits at law based on said awards, all of which suits will depend upon precisely the same state of facts and be governed by identically the same principles of law, thereby subjecting your petitioner to a multiplicity of suits at law. That in the event that reparation is awarded by the commission, your petitioner will be placed at a great disadvantage in defending suits at law based on such award, since the commission's finding of the ultimate facts is by statute made *prima facie* correct, and no opportunity is given petitioner to have a judicial review of the strength and competency of the evidence upon which such a finding rests.

8 The premises considered, your petitioner therefore prays that upon the filing of this petition, a subpoena issue under the seal of this honorable court, directed to the United States of America, commanding it on a day certain to be named to appear before this honorable court and to answer all and singular the allegations herein, but not under oath, answer under oath being expressly waived, that a day be fixed for the hearing of this petition, prior to October 1st, 1915, and that upon such hearing an order be entered annulling, setting aside, and cancelling the said unlawful order of the said commission and a temporary injunction issue enjoining and restraining the said commission, its members, officers, employees, and agents from proceeding further in the premises, or taking any further steps whatever toward assessing damages in the said causes against your petitioner. And that upon final hearing such order and injunction be made final and perpetual. And if the relief herein specifically prayed for be inappropriate or insufficient then for such other further and general relief as to the court may seem right and proper.

And your petitioner, in duty bound, will ever pray, etc.

ILLINOIS CENTRAL RAILROAD COMPANY,
By R. V. FLETCHER, *Solicitor*.

9 STATE OF ILLINOIS, *County of Cook, City of Chicago, ss:*

Before me, a notary public of the said city, county, and State, C. M. Kittle, personally known to me, who being by me first duly sworn, on oath says that he is an officer of the Illinois Central Railroad Company, being assistant to the president, and that he

has read the allegations of the foregoing petition and to the best of his knowledge and belief the facts therein stated are true and correct.

C. M. KITTLE.

Sworn to and subscribed before me this third day of September, 1915.

[SEAL.] W. W. FOSTER,
Notary Public.

11 EXHIBIT A.

Before the Interstate Commerce Commission.

VULCAN COAL & MINING COMPANY
vs.
ILLINOIS CENTRAL RAILROAD COMPANY.

Your petitioner, the Vulcan Coal and Mining Company, would respectfully represent:

1. That it is a corporation organized under and by virtue of the laws of the State of Illinois, and is engaged in the mining and shipping of coal from Belleville, Illinois, over the lines of the Illinois Central Railroad Company, hereinafter designated as respondent, and for a period of two years past has been engaged in such mining and shipping of coal over said respondent's road from the said Belleville, Illinois, to St. Louis, Missouri, and other interstate points, and that the business address of this petitioner is Belleville, Illinois.

2. That the Illinois Central Railroad Company, herein named as respondent, is a common carrier engaged in the business of transporting coal and other merchandise in the State of Illinois from said Belleville, Illinois, and other points in said State to interstate points, and as such is subject to the act to regulate commerce.

3. That the said respondent has upon its lines of railway and shipping therefrom to interstate points a large number of mines upon its various divisions, both in the State of Illinois and the State of Kentucky, and that the mines of this petitioner are situated on the St. Louis division of the said respondent carrier in the State of Illinois.

12 4. That under the provisions of the act to regulate commerce it became and was the duty of the said respondent to furnish this petitioner with cars and other transportation facilities for the purpose of transporting to the markets the output of the mines of the said petitioner upon the reasonable requests of the said petitioner; and your petitioner further represents that during the said period of two years this petitioner has operated its said mine, and from time to time during the periods as hereinafter set forth has requested from the said Illinois Central Railroad Company, respondent herein, cars and transportation for the purpose of transporting the output of the mines of this petitioner from Belleville, Illinois, to St. Louis, Missouri, and other interstate points, but that said respondent failed in its duty in this regard in furnishing unto said petitioner the cars

and transportation required by this petitioner and by it from said respondent requested at the various times during the said period of two years when the said cars and transportation were demanded and required, although this petitioner was able and ready, had such cars been furnished, to ship the full capacity of the mine.

5. And this petitioner further represents that the periods of active demands during the said two years and the periods during which respondent failed to furnish such cars and transportation were as follows:

During the months of October 1st, 1911, to December 31st, 1911, hereinafter designated as the first period.

During the months of January 1st, 1912, to April 1st, 1912, hereinafter designated as the second period.

During the months of September 1st, 1912, to April 1st, 1913, hereinafter designated as the third period.

6. This petitioner further represents that had it received in
13 response to its requests the cars and transportation facilities from said respondent to which it was entitled, sufficient to meet its business requirements during said periods it could have shipped and disposed of the following:

During the first period, 30,000 tons.

During the second period, 30,000 tons.

During the third period, 70,000 tons.

And that because of the failure of said respondent to furnish said cars and transportation facilities it was actually able to ship during said periods only as follows:

During the first period, 7,197 tons.

During the second period, 9,819 tons.

During the third period, 17,118 tons.

Making a shortage for the various periods as follows:

During the first period, 22,803 tons.

During the second period, 20,181 tons.

During the third period, 52,882 tons.

All of which tonnage would have moved to points without the State of Illinois.

7. That the interstate shipments from the said mine during the said periods were as follows:

During the first period, 2,025 tons.

During the second period, 3,195 tons.

During the third period, 5,940 tons.

8. That the cost of production of the said coal at the said mine during the said several periods was as follows:

During the first period, $1.05 per ton.

During the second period, $1.01 per ton.

During the third period, $1.11 per ton.

While the cost of production had there been a full car supply during said periods would have been as follows:

During the first period, 85 c. per ton.

During the second period, 85 c. per ton.
During the third period, 85 c. per ton.

9. That the average market selling price of the said product during said periods f. o. b. mine was as follows:

14 During the first period, 88 c. per ton.
During the second period, $1.25 per ton.
During the third period, $1.02 per ton.

10. Your petitioner would therefore present that because of the failure of the said respondent to furnish cars and transportation as hereinbefore set forth there ensued to this petitioner a loss on the tonnage shipped on interstate traffic of the difference per ton between the cost of production and what would have been the cost of production had said cars and transportation been furnished, amounting in each of said periods to the following:

During the first period, 2,025 tons at 20 c. per ton, amounting to	$405.00
During the second period, 3,195 tons at 16 c. per ton, amounting to	511.20
During the third period, 5,940 tons at 26 c. per ton, amounting to	1,544.40
Or a total of	2,460.60

11. Your petitioner would further represent that because of the failure of the said respondent to furnish cars and transportation as aforesaid, there accrued unto this petitioner a loss, because of its inability to ship coal for which it had a market, on the tonnage which the said petitioner would have shipped, had cars and transportation been furnished, per ton, of the difference between the actual selling price of each of said periods and the average cost of production had there been a full car supply, amounting to as follows:

During the first period, 22,803 tons at 3 c. per ton, amounting to	$684.09
During the second period, 20,181 tons at 40 c. per ton, amounting to	8,072.40
During the third period, 52,882 tons at 17 c. per ton, amounting to	8,989.94
Or a total of	17,746.43

15 12. Your petitioner would further represent that the said respondent discriminated against this petitioner in contravention and violation of section 3 of said act to regulate commerce in the furnishing of cars and transportation, and that during the periods of car shortage, which were the same periods designated as periods, one, two, and three herein, the said respondent discriminated against this petitioner in the distribution of available equipment in favor of other mines on the St. Louis division and that it discriminated against this petitioner and other mines on the St. Louis divi-

sion in the distribution of available equipment in favor of other divisions in the State of Illinois, and also and especially in favor of mines on the Kentucky division of said respondent road in the State of Kentucky, and that the said respondent further discriminated against this petitioner in its supply of cars in times of car shortage in favor of mines on the St. Louis division and other divisions of said respondent carrier, said mines being known and designated as "whole output mines," by furnishing unto said whole output mines during the said periods of car shortage, being the same periods designated as one, two, and three, a full car supply and furnishing to this petitioner but a proportionate car supply.

And this petitioner presents that had it been furnished its proper proportion of the available car supply during the said several periods it would have received equipment equal to an additional 10 per cent of its rated capacity over and above the transportation and cars furnished or equipment sufficient to transport in interstate traffic in addition to the tonnage transported from said mine a tonnage as follows:

During the first period, 3,000 tons.
During the second period, 3,000 tons.
During the third period, 7,000 tons.

16 13. That the cost of production during the said various periods was as hereinbefore set forth as follows:

During the first period, $1.05 per ton.
During the second period, $1.01 per ton.
During the third period, $1.11 per ton.

And that had this additional equipment and transportation been furnished the cost of production would have been as follows:

During the first period, 85 c. per ton.
During the second period, 85 c. per ton.
During the third period, 85 c. per ton.

14. That it shipped during the said period to interstate points as follows:

During the first period, 2,025 tons.
During the second period, 3,195 tons.
During the third period, 5,940 tons.

And that because of the additional cost of production accruing as the result of the discrimination of the respondent in this regard and the failure to furnish this petitioner its proper proportion of the available equipment there accrued to this petitioner a loss on said tonnage as follows:

During first period, 2,025 tons at 20 c. per ton, amounting to	$405.00
During second period, 3,195 tons at 16 c. per ton, amounting to	511.20
During third period, 5,940 tons at 26 c. per ton, amounting to	1,544.40
A total of	2,460.60

15. And this petitioner further represents that the average selling price at the mine during said periods was as follows:

During the first period, 88 c. per ton.

During the second period, $1.25 per ton.

During the third period, $1.02 per ton.

17 And that the cost of production of the said coal, had this petitioner been furnished its proper proportion of the available equipment, would have been as follows:

During the first period, 85 c. per ton.

During the second period, 85 c. per ton.

During the third period, 85 c. per ton.

And that the loss per ton on the tonnage that this petitioner was not permitted to ship because of the said discrimination on the part of the respondent during the said periods was as follows:

During the first period, 3 c. per ton.

During the second period, 40 c. per ton.

During the third period, 17 c. per ton.

And that the total loss during said periods was as follows:

During the first period, 3,000 tons at 3 c. per ton, amounting to	$90.00
During the second period, 3,000 tons at 40 c. per ton, amounting to	1,200.00
During the third period, 7,000 tons at 17 c. per ton, amounting to	1,190.00
Or a total of	2,480.00

16. Your petitioner would therefore respectfully request that the said respondent may be required to file its answer unto this petition; that a hearing and investigation may be had by and under the direction of this commission; that the amount of loss resulting from the failure of the said respondent to furnish equipment as well as because of the said discrimination may be by this commission ascertained; and that said respondent may be ordered to pay unto this petitioner such amounts as may by this commission be ascertained and found to be due this petitioner because of the said failure and discrimination together with an attorney's fee to attorneys for

18 petitioner in this behalf as by statute provided; and that this commission may grant such other and further relief in the premises as to this commission shall seem meet.

VULCAN COAL AND MINING COMPANY.
Complainant, Belleville, Ills.

WINKLEMANN & OGLE,
R. W. ROPIEQUET,
Attorneys, Belleville, Ills.

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Exhibit B.

Before the Interstate Commerce Commission.

St. Louis-Coulterville Coal Company
v.
Illinois Central Railroad Company.

Your petitioner, the St. Louis-Coulterville Coal Company, would respectfully represent:

1. That it is a corporation organized under and by virtue of the laws of the State of Illinois, and is engaged in the mining and shipping of coal from Coulterville, Illinois, over the lines of the Illinois Central Railroad Company, hereinafter designated as respondent, and for a period of two years past has been engaged in such mining and shipping of coal over said respondent's road from the said Coulterville, Illinois, to St. Louis, Missouri, and other interstate points, and that the business address of this petitioner is Belleville, Illinois.

2. That the Illinois Central Railroad Company, herein named as respondent, is a common carrier engaged in the business of transporting coal and other merchandise in the State of Illinois from said Coulterville, Illinois, and other points in said State to interstate points, and as such is subject to the act to regulate commerce.

3. That the said respondent has upon its lines of railway and shipping therefrom to interstate points, a large number of mines upon its various divisions, both in the State of Illinois and the State of Kentucky, and that the mines of this petitioner are situated

20 on the St. Louis division of the said respondent carrier in the State of Illinois.

4. That under the provisions of the act to regulate commerce it became and was the duty of the said respondent to furnish this petitioner with cars and other transportation facilities for the purpose of transporting to the markets the output of the mines of the said petitioner upon the reasonable requests of the said petitioner; and your petitioner further represents that during the said period of two years this petitioner has operated its said mine, and from time to time during the periods as hereinafter set forth has requested from the said Illinois Central Railroad Company, respondent herein, cars and transportation for the purpose of transporting the output of the mines of this petitioner from Coulterville, Illinois, to St. Louis, Missouri, and other interstate points, but that said respondent failed in its duty in this regard in furnishing unto said petitioner the cars and transportation required by this petitioner and by it from said respondent requested at the various times during the said period of two years when the said cars and transportation were demanded and required, although this petitioner was able and ready, had such cars been furnished, to ship the full capacity of the mine.

5. And this petitioner further represents that the periods of active demands during the said two years and the periods during which respondent failed to furnish such cars and transportation were as follows:

During the months of September 1st, 1911, to December 31st, 1911, hereinafter designated as the first period;

During the months of January 1st, 1912, to April 1st, 1912, hereinafter designated as the second period;

During the months of September 1st, 1912, to April 1st, 1913, hereinafter designated as the third period.

21 6. This petitioner further represents that had it received in response to its requests the cars and transportation facilities from said respondent to which it was entitled, sufficient to meet its business requirements during said periods, it could have shipped and disposed of the following:

During the first period, 50,000 tons.

During the second period, 40,000 tons.

During the third period, 80,000 tons.

And that because of the failure of said respondent to furnish said cars and transportation facilities it was actually able to ship during said periods only as follows:

During the first period, 16,876 tons.

During the second period, 10,722 tons.

During the third period, 27,548 tons.

Making a shortage for the various periods as follows:

During the first period, 33,124 tons.

During the second period, 29,278 tons.

During the third period, 51,452 tons.

All of which tonnage would have moved to points without the State of Illinois.

7. That the interstate shipments from the said mine during the said periods were as follows:

During the first period, 8,000 tons.

During the second period, 5,080 tons.

During the third period, 15,000 tons.

8. That the cost of production of the said coal at the said mine during the said several periods was as follows:

During the first period, $1.00 per ton.

During the second period, 98 c. per ton.

During the third period, $1.05 per ton.

While the cost of production had there been a full car supply during said periods would have been as follows:

During the first period, 86 c. per ton.

During the second period, 86 c. per ton.

During the third period, 90 c. per ton.

22 9. That the average market selling price of the said product during said periods f. o. b. mine was as follows:

During the first period, 90 c. per ton.

During the second period, $1.25 per ton.

During the third period, 97 c. per ton.

10. Your petitioner would therefore present that because of the failure of the said respondent to furnish cars and transportation as hereinabove set forth there ensued to this petitioner a loss on the tonnage shipped on interstate traffic of the difference per ton between the cost of production and what would have been the cost of production had said cars and transportation been furnished, amounting in each of said periods to the following:

During the first period, 8,000 tons, at 14 c., total	$1,120.00
During the second period, 5,080 tons, at 12 c., total	609.60
During the third period, 15,000 tons, at 15 c., total	2,250.00
Or a total of	3,979.60

11. Your petitioner would further represent that because of the failure of the said respondent to furnish cars and transportation as aforesaid, there accrued unto this petitioner a loss, because of its inability to ship coal for which it had a market, on the tonnage which the said petitioner would have shipped, had cars and transportation been furnished, per ton, of the difference between the actual selling price of each of said periods and the average cost of production had there been a full car supply, amounting to as follows:

During the first period, 33,124 tons at 4 c., amounting to	$1,324.96
During the second period, 29,278 tons at 39 c., amounting to	11,418.42
During the third period, 51,452 tons at 7 c., amounting to	3,601.14
Or a total of	16,345.02

23 12. Your petitioner would further represent that the said respondent discriminated against this petitioner in contravention and violation of section 3 of said act to regulate commerce in the furnishing of cars and transportation, and that during the periods of car shortage which were the same periods designated as periods one, two, and three herein, the said respondent discriminated against this petitioner in the distribution of available equipment in favor of other mines on the St. Louis Division and that it discriminated against this petitioner and other mines on the St. Louis Division in the distribution of available equipment in favor of other divisions in the State of Illinois, and also and especially in favor of mines on the Kentucky Division of said respondent road in the State of Kentucky, and that the said respondent further discriminated against this petitioner in its supply of cars in times of car shortage in favor of mines on the St. Louis Division and other divisions of the said respondent carrier, said mines being known and designated as "whole output mines," by furnishing unto said whole output mines during the said periods of car shortage, being the same periods designated as one, two, and three, a full car supply and furnishing to this petitioner but a proportionate car supply.

And this petitioner presents that had it been furnished its proper proportion of the available car supply during the said several periods it would have received equipment equal to an additional 10 per cent of its rated capacity over and above the transportation and cars furnished or equipment sufficient to transport in interstate traffic in addition to the tonnage transported from said mine, a tonnage as follows:

During the first period, 5,000 tons.

During the second period, 4,000 tons.

During the third period, 8,000 tons.

24 13. That the cost of production during the said various periods was as hereinbefore set forth as follows:

During the first period, $1.00 per ton.

During the second period, 98 c. per ton.

During the third period, $1.05 per ton.

And that had this additional equipment and transportation been furnished the cost of production would have been as follows:

During the first period, 86 c. per ton.

During the second period, 86 c. per ton.

During the third period, 90 c. per ton.

14. That it shipped during the said period to interstate points as follows:

During the first period, 8,000 tons.

During the second period, 5,080 tons.

During the third period, 15,000 tons.

And that because of the additional cost of production accruing as the result of the discrimination of the respondent in this regard and the failure to furnish this petitioner its proper proportion of the available equipment there accrued to this petitioner a loss on said tonnage as follows:

During first period, 8,000 tons at 14 c. per ton, amounting to	$1,120.00
During second period, 5,080 tons at 12 c. per ton, amounting to	609.60
During third period, 15,000 tons at 15 c. per ton, amounting to	2,250.00
A total of	3,979.60

15. And this petitioner further represents that the average selling price at the mine during said periods was as follows:

During the first period, 90 c. per ton.

During the second period, $1.25 per ton.

During the third period, 97 c. per ton.

25 And that the cost of production of the said coal, had this petitioner been furnished its proper proportion of the available equipment, would have been as follows:

During the first period, 86 c. per ton.

During the second period, 86 c. per ton.

During the third period, 90 c. per ton.

And that the loss per ton on the tonnage that this petitioner was not permitted to ship because of the said discrimination on the part of the respondent during the said periods was as follows:

During the first period, 4 c. per ton.

During the second period, 39 c. per ton.

During the third period, 7 c. per ton.

And that the total loss during said periods was as follows:

During first period, 5,000 tons, at 4 c. per ton, amounting to	$200.00
During second period, 4,000 tons, at 39 c. per ton, amounting to	1,560.00
During third period, 8,000 tons, at 7 c. per ton, amounting to	560.00
Or a total of	2,320.00

16. Your petitioner would therefore respectfully request that the said respondent may be required to file its answer unto this petition; that a hearing and investigation may be had by and under the direction of the commission; that the amount of loss resulting from the failure of the said respondent to furnish equipment, as well as because of the said discrimination, may be by this commission ascertained; and that said respondent may be ordered to pay unto this petitioner such amounts as may by this commission be ascertained and found to be due this petitioner because of the said failure and discrimination, together with an attorney's fee to attorneys for petitioner in
26 his behalf, as by statute provided; and that this commission may grant such other and further relief as to this commission shall seem meet.

ST. LOUIS-COULTERVILLE COAL COMPANY,
Complainant, Belleville, Ill.

WINKLEMAN & OGLE,
R. W. ROPIEQUET,
Attorneys, Belleville, Ill.
R. W. ROPIEQUET.
WINKLEMANN & OGLE.

27 EXHIBIT C.

Before the Interstate Commerce Commission.

GROOM COAL COMPANY
vs.
ILLINOIS CENTRAL RAILROAD COMPANY.

Your petitioner, the Groom Coal Company, would respectfully represent:

1. That it is a corporation organized under and by virtue of the laws of the State of Illinois, and is engaged in the mining and ship-

ping of coal from Belleville, Illinois, over the lines of the Illinois Central Railroad Company, hereinafter designated as respondent, and for a period of two years past has been engaged in such mining and shipping of coal over said respondent's road from the said Belleville, Illinois, to St. Louis, Missouri, and other interstate points, and that the business address of this petitioner is Belleville, Illinois.

2. That the Illinois Central Railroad Company, herein named as respondent, is a common carrier engaged in the business of transporting coal and other merchandise in the State of Illinois from said Belleville, Illinois, and other points in said State to interstate points, and as such is subject to the act to regulate commerce.

3. That the said respondent has upon its lines of railway and shipping therefrom to interstate points a large number of mines upon its various divisions, both in the State of Illinois and the State of Kentucky, and that the mines of this petitioner are situated on the St. Louis division of the said respondent carrier in the State of Illinois.

28 4. That under the provisions of the act to regulate commerce it became and was the duty of the said respondent to furnish this petitioner with cars and other transportation facilities for the purpose of transporting to the markets the output of the mines of the said petitioner upon the reasonable request of the said petitioner; and your petitioner further represents that during the said period of two years this petitioner has operated its said mine and from time to time during the periods as hereinafter set forth has requested from the said Illinois Central Railroad Company, respondent herein, cars and transportation for the purpose of transporting the output of the mines of this petitioner from Belleville, Illinois, to St. Louis, Missouri, and other interstate points, but that said respondent failed in its duty in this regard in furnishing unto said petitioner the cars and transportation required by this petitioner, and by it from said respondent requested at the various times during the said period of two years when the said cars and transportation were demanded and required, although this petitioner was able and ready, had such cars been furnished, to ship the full capacity of the mine.

5. And this petitioner further represents that the periods of active demands during the said two years and the periods during which respondent failed to furnish such cars and transportation were as follows:

During the months of September 1st, 1911, to December 31st, 1911, hereinafter designated as the first period.

During the months of January 1st, 1912, to April 1st, 1912, hereinafter designated as the second period.

During the months of September 1st, 1912, to April 1st, 1913, hereinafter designated as the third period.

29 6. This petitioner further represents that had it received in response to its request the cars and transportation facilities from said respondent to which it was entitled sufficient to

meet its business requirements during said periods it could have shipped and disposed of the following:

During the first period, 25,000 tons.
During the second period, 20,000 tons.
During the third period, 45,000 tons.

And that because of the failure of said respondent to furnish said cars and transportation facilities it was actually able to ship during said periods only as follows:

During the first period, 9,311 tons.
During the second period, 5,714 tons.
During the third period, 21,919 tons.

Making a shortage for the various periods as follows:

During the first period, 15,689 tons.
During the second period, 14,286 tons.
During the third period, 23,081 tons.

All of which tonnage would have moved to points without the State of Illinois.

7. That the interstate shipments from the said mine during the said periods were as follows:

During the first period, 8,380 tons.
During the second period, 5,142 tons.
During the third period, 19,727 tons.

8. That the cost of production of the said coal at the said mine during the said several periods was as follows:

During the first period, 84 c. per ton.
During the second period, 85 c. per ton.
During the third period, 81 c. per ton.

While the cost of production had there been a full car supply during said periods would have been as follows:

During the first period, 75 c. per ton.
During the second period, 75 c. per ton.
During the third period, 75 c. per ton.

9. That the average market selling price of said product during said periods, f. o. b. mine, was as follows:

During the first period, 90 c. per ton.
During the second period, $1.25 per ton.
During the third period, 97 c. per ton.

10. Your petitioner would therefore present that because of the failure of the said respondent to furnish cars and transportation as hereinabove set forth there ensued to this petitioner a loss on the tonnage shipped on interstate traffic of the difference per ton between the cost of production and what would have been the cost of production had said cars and transportation been furnished, amounting in each of said periods to the following:

During the first period, 8,380 tons, at 9 c., total	$754.20
During the second period, 5,142 tons, at 10 c., total	514.20
During the third period, 19,727 tons, at 6 c., total	1,183.62
Or a total of	2,452.02

11. Your petitioner would further represent that because of the failure of the said respondent to furnish cars and transportation as aforesaid, there accrued unto this petitioner a loss, because of its inability to ship coal for which it had a market, on the tonnage which the said petitioner would have shipped, had cars and transportation been furnished, per ton, of the difference between the actual selling price of each of said periods and the average cost of production had there been a full car supply, amounting to as follows:

During the first period, 15,689 tons, at 15 c., amounting to	$2,353.35
During the second period, 14,286 tons, at 50 c., amounting to	7,143.00
During the third period, 23,081 tons, at 22 c., amounting to	5,077.82
Or a total of	14,574.17

31 12. Your petitioner would further represent that the said respondent discriminated against this petitioner in contravention and violation of section 3 of said act to regulate commerce in the furnishing of cars and transportation, and that during the periods of car shortage, which were the same periods designated as periods one, two, and three herein, the said respondent discriminated against this petitioner in the distribution of available equipment in favor of other mines on the St. Louis division and that it discriminated against this petitioner and other mines on the St. Louis division in the distribution of available equipment in favor of other divisions in the State of Illinois, and also and especially in favor of mines on the Kentucky division of said respondent road in the State of Kentucky, and that the said respondent further discriminated against this petitioner in its supply of cars in times of car shortage in favor of mines on the St. Louis division and other divisions of the said respondent carrier, said mines being known and designated as "whole-output mines," by furnishing unto said whole-output mines during the said periods of car shortage, being the same periods designated as one, two, and three, a full car supply and furnishing to this petitioner but a proportionate car supply.

And this petitioner presents that had it been furnished its proper proportion of the available car supply during the said several periods it would have received equipment equal to an additional 10 per cent of its rated capacity over and above the transportation and cars furnished, or equipment sufficient to transport in intersate traffic in addition to the tonnage transported from said mine a tonnage as follows:

During the first period, 2,500 tons.
During the second period, 2,000 tons.
During the third period, 4,500 tons.

32 13. That the cost of production during the said various periods was as hereinbefore set forth as follows:

During the first period, 84 c. per ton.
During the second period, 85 c. per ton.
During the third period, 81 c. per ton.

And that had this additional equipment and transportation been furnished the cost of production would have been as follows:

During the first period, 75 c. per ton.

During the second period, 75 c. per ton.

During the third period, 75 c. per ton.

14. That it shipped during the said period to interstate points as follows:

During the first period, 8,380 tons.

During the second period, 5,142 tons.

During the third period, 19,727 tons.

And that because of the additional cost of production accruing as the result of the discrimination of the respondent in this regard and the failure to furnish this petitioner its proper proportion of the available equipment there accrued to this petitioner a loss on said tonnage as follows:

During first period, 8,380 tons, at 9 c. per ton, amounting to	$754.20
During second period, 5,142 tons, at 10 c. per ton, amounting to	514.20
During third period, 19,727 tons, at 6 c. per ton, amounting to	1,183.62
A total of	2,452.02

15. And this petitioner further represents that the average market selling price at the mine during said period was as follows:

During the first period, 90 c. per ton.

During the second period, $1.25 per ton.

During the third period, 97 c. per ton.

And that the cost of production of the said coal had
33 this petitioner been furnished its proper proportion of the available equipment would have been as follows:

During the first period, 75 c. per ton.

During the second period, 75 c. per ton.

During the third period, 75 c. per ton.

And that the loss per ton on the tonnage that this petitioner was not permitted to ship because of the said discrimination on the part of the respondent during the said periods was as follows:

During the first period, 15 c. per ton.

During the second period, 50 c. per ton.

During the third period, 22 c. per ton.

And that the total loss during said periods was as follows:

During the first period, 2,500 tons, at 15 c. per ton, amounting to	$375.00
During the second period, 2,000 tons, at 50 c. per ton, amounting to	1,000.00
During the third period, 4,500 tons, at 22 c. per ton, amounting to	990.00
Or a total of	2,365.00

16. Your petitioner would therefore respectfully request that the said respondent may be required to file its answer unto this petition; that a hearing and investigation may be had by and under the direction of this commission; that the amount of loss resulting from the failure of the said respondent to furnish equipment as well as because if the said discrimination, may be by this commission ascertained; and that said respondent may be ordered to pay unto this petitioner such amounts as may by this commission be ascertained and found to be due this petitioner because of the said failure and discrimination together with an attorney's fee to attorneys for petitioner in this behalf as by statute provided; and that this
34 commission may grant such other and further relief in the premises as to this commission shall seem.

GROOM COAL COMPANY,
Complainant, Belleville, Ills.

R. W. ROPIEQUET,
Attorney, Belleville, Ills.

35 EXHIBIT D.

Before the Interstate Commerce Commission.

VULCAN COAL & MINING COMPANY
v.
ILLINOIS CENTRAL RAILROAD COMPANY. } No. 6128.

ST. LOUIS-COULTERVILLE COAL COMPANY
v.
SAME. } No. 6128 (Sub-No. 1).

GROOM COAL COMPANY
v.
SAME. } No. 6128 (Sub-No. 2).

Submitted April 9, 1914. Decided January 30, 1915.

Complainants request reparation for damages occasioned by the alleged failure of the defendant upon reasonable request to furnish cars for the shipment of coal from complainants' mines; defendant denies the commission's jurisdiction and argues that the question raised is one for the determination of the court; Held:

1. The question as to the extent to which defendant failed to comply with the duty it owed complainants is an administrative one, of which the commission alone can take original jurisdiction.
2. It is obvious that the absolute refusal of a carrier to furnish a shipper cars would be a violation requiring no administrative determination and of which the courts could take primary jurisdiction.

3. Considerations of expediency should have no weight in deciding whether or not the commission should assume jurisdiction.
4. Reference made to cases dealing with the question of priority of jurisdiction as between the commission and the courts.
5. The assumption of jurisdiction in the present case is not inconsistent with the mandamus provisions of section 23 of the act. B. & O. R. R. Co. v. Pitcairn Coal Co., 215 U. S., 481.
6. Defendant is not deprived of its rights under the seventh amendment to the Constitution.

36 7. A carrier must do more than provide itself with sufficient equipment for the slack period of coal production.

8. A carrier must assume the burden of explaining or excusing its failure to furnish cars.
9. The question of whether or not the car supply was reasonably adequate at these particular mines and the question of the amount of damages, if any, left for a subsequent hearing.

R. W. Ropiequet and Wilkleman & Ogle for complainants; R. V. Fletcher for defendant.

Report of the commission.

MEYER, *Commissioner:*

Three complaints are under consideration in this case, identical both as to their averments and as to the character of proof offered. The complainants operate coal mines at Belleville and Coulterville, Ill., on the line of defendant's railroad. They allege that during certain periods of 1911, 1912 and 1913, defendant failed upon request to furnish a reasonably adequate supply of cars for the shipment of coal from their mines. We are asked to award reparation equal to the loss of profits on interstate shipments of coal which would have been made had the car supply been reasonable, plus the greater cost of mining due to restricted output. The complaints as originally drawn included a prayer for damages on account of the alleged failure of defendant to distribute its available equipment upon a nondiscriminatory basis, but upon the argument the issues were narrowed to a consideration of the reasonableness of the car supply during the periods in question.

The first question which presents itself is one of jurisdiction. In its answer and upon the hearing and argument defendant contends that we are without jurisdiction to award damages on account of any alleged failure on its part to furnish equipment. It is argued that this is a question for the determination of the courts.

37 Section 1 of the act to regulate commerce, as amended June 29, 1906, provides, in part, that—

"* * * * the term 'transportation' shall include cars * * * and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor. * * *."

Section 8 of the act provides—

"That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

Section 9 of the act provides, in part—

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any District or Circuit Court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

Section 13 of the act gives the commission jurisdiction upon complaint of anything done or omitted to be done in contravention of the provisions of the act by any common carrier subject to its provisions and, in the event of a failure of the carrier to satisfy
38 the complaint, provides for investigation by the commission.

In the case of an investigation it is by section 14 of the act made the duty of the commission to state its conclusions in writing, together with its decision, order, or requirement in the premises, and, in case damages are awarded, the findings of fact on which the award is made.

Although it is recognized by defendant that the provisions of section 1 of the act above referred to specifically impose upon carriers the duty to furnish cars for interstate traffic upon reasonable requests therefor, it is argued that it does not necessarily follow that this commission has jurisdiction to award damages consequent upon a carrier's failure to perform this duty. Attention is called to several sections of the act regulating matters which it is asserted must obviously be committed to the courts. Thus by section 20 it is made the duty of each railroad company to issue a bill of lading, and it is provided that the initial carrier shall be responsible for all damages even though they be caused by a connecting carrier. By section 23 jurisdiction is conferred upon the courts of the United States to entertain petitions for writs of mandamus to compel common carriers to move and transport traffic and to furnish cars. Other provisions of the act provide for criminal prosecution, and it is submitted that this commission would not sit as a criminal court to

decide whether the act has been violated and to impose punishment therefor. It is argued that these provisions of the act indicate that some things therein contained are for the commission to decide, and other matters are left to the courts.

Based on the decision of the Supreme Court in T. & P. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S., 426, defendant contends that if the commission has jurisdiction in a case of this sort, the courts have not, and conversely, if the courts have jurisdiction, the commis-
39 sion has not. It claims that in this decision the Supreme Court has read out of section 9 of the act that provision which gives any person claiming to be injured by any common carrier subject to the provisions of the act the election either to bring his complaint before the commission or to bring suit in a court of competent jurisdiction. Consequently, it is argued that when the complainant in this case asks for an order of reparation at the hands of the commission it is a denial of the jurisdiction of the court. In further support of this position defendant calls attention to B. & O. R. R. Co. v. Pitcairn Coal Co., 215 U. S., 481; P. R. R. Co. v. International Coal Mining Co., 230 U. S., 184; Morrisdale Coal Co. v. P. R. R. Co., 230 U. S., 304; S. Ry. Co. v. Reid, 222 U. S., 424; and Mitchell Coal Co. v. P. R. R. Co., 230 U. S., 247. These cases will be discussed in detail later on. Defendant argues that suits for damages on account of failure to furnish cars are among the matters mentioned in the act to regulate commerce with which the commission is not called upon directly to deal, and jurisdiction in regard to which is obviously confererd upon the courts.

It is further contended that, under the seventh amendment to the Federal Constitution, the question here under consideration requires a jury trial, of which defendant will be deprived should the commission assume jurisdiction.

It is urged that the commission has not heretofore entertained the view that it has jurisdiction in controversies of this character. Defendant calls attention to the following conference rulings and decisions wherein we have refused to take jurisdiction in situations which defendant alleges are analogous to the one presented in the present case: Conference Rulings Nos. 127, 296, 317, and 384:
Council v. W. & A. R. R. Co., 1 I. C. C., 339; New Orleans
40 Cotton Exchange v. I. C. R. R. Co., 3 I. C. C., 534; Loud v. S. C. R. R. Co., 5 I. C. C., 529; Duncan v. A., T. & S. F. R. R. Co., 6 I. C. C., 85; Jones v. St. L. & S. F. R. R. Co., 12 I. C. C., 144; Blume & Co. v. Wells, Fargo & Co., 15 I. C. C., 53; Royal Brewing Co. v. Adams Express Co., 15 I. C. C., 255; Joynes v. P. R. R. Co., 17 I. C. C., 361; Hillsdale Coal & Coke Co. v. P. R. R. Co., 19 I. C. C., 356; Ponchatoula Farmers Asso. v. I. C. R. R. Co., 19 I. C. C., 513; Buffalo Hardwood Lumber Co. v. B. & O. S. W. R. R. Co., 21 I. C. C., 536; and Richmond-Eureka Mining Co. v. E. N. Ry. Co., 29 I. C. C., 62.

Attention is also called to the decision of the United States Circuit Court for the Western District of Missouri in Danciger v. Wells, Fargo & Co., 154 Fed., 379, and to the decision of the Supreme Court of the United States in L. & N. R. R. Co. v. Cook Brewing Co., 223 U. S., 70, as holding, according to defendant's interpretation of these opinions, that the commission has no jurisdiction to award damages in case shipments have been refused by a carrier. It is argued that there can be no distinction in principle between the refusal on the part of a carrier to accept shipments and the failure on the part of the same carrier to furnish needed equipment. These cases will also be given consideration later on. Defendant states that numerous cases of the failure of carriers to furnish cars have been entertained by the courts, and that the causes have proceeded to judgment without any point having been made as to the necessity of prerequisite action by the commission. If any such action by the commission be necessary, it is alleged that a large number of cases now before the courts are not properly there.

Reverting again to section 23 of the act and its bearing upon the present case, the question is asked how the theory that the determination of the legal sufficiency of the car supply must be primarily submitted to the commission can be reconciled with the provisions
41 of section 23, which commit to the courts the right to issue writs of mandamus to compel carriers to move traffic and furnish cars. It is argued that whether the suit be for mandamus under section 23 or whether it be for damages, as in the instant case, the question in both cases must be to find out whether the car supply was legally sufficient.

A further contention made by defendant is that as a matter of expediency this commission should not take jurisdiction of such matters as those herein involved. Defendant fears that if complaints of this character are recognized by the commission it will be seriously handicapped by lack of time to devote to important questions clearly committed to it by the provisions of the act.

The leading case on the question of priority of jurisdiction as between the commission and the courts is T. & P. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S., 426. In that case suit was brought in a State court to recover damages consequent upon the exaction by the defendant carrier, on an interstate shipment, of an alleged unreasonable rate. The rate charged was stated in a schedule duly filed and published in accordance with the act to regulate commerce. This commission had never passed on its legality. The Supreme Court refused to construe the act as conferring any right to recover damages for unreasonable charges prior to a finding by the commission. On pages 440 and 441 of the opinion in the Abilene case the court said—

"* * * if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the commission, finding the established rate to be unreasonable and

ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion
42 of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. * * * For if, without previous action by the commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached in identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirements as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted."

On pages 441 and 442, the effect of section 9 of the act is thus defined:

"Nor is there merit in the contention that section 9 of the act compels to the conclusion that it was the purpose of Congress to confer power upon courts primarily to relieve from the duty of enforcing the established rate by finding that the same as to a particular person or corporation was so unreasonable as to justify an award of damages. True it is that the general terms of the section when taken alone might sanction such a conclusion, but when the provision of that section is read in connection with the context of the act and in the light of the considerations which we have enumerated we think the broad construction contended for is not admissible. And this becomes particularly cogent when it is observed that the
43 power of the courts to award damages to those claiming to have been injured, as provided in the section, contemplates only a decree in favor of the individual complainant, redressing the particular wrong asserted to have been done, and does not embrace the power to direct the carrier to abstain in the future from similar violations of the act—in other words, to command a correction of the established schedules—which power, as we have shown, is conferred by the act upon the commission in express terms. In other words, we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of

the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of. Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such scredule was in force."

This case was followed by B. & O. R. R. Co. v. Pitcairn Coal Co., 215 U. S., 481. In that case the coal company filed a petition of mandamus in the Federal courts, under section 23 of the act, to prevent an alleged discrimination in the distribution of coal cars pursuant to a regulation of the defendant carrier. The petition was dismissed because the matter had not been first submitted to this commission.

On pages 493 and 494 of its opinion the Supreme Court said:

44 "The controversy is controlled by the considerations which governed the ruling in Texas & Pacific Ry. Company v. Abilene Cotton Oil Co., 204 U. S., 246. * * * The ruling there made dealt with the provisions of the act as they existed prior to the amendments adopted in 1906, and when those amendments are considered they rendered, if possible, more imperative the construction given to the act by that ruling, since, by section 15, as enacted by the amendment of June 29, 1906, the commission is empowered, indeed it is made its duty, in disposing of a complaint, not only to determine the legality of the practice alleged to give rise to an unjust preference of undue discrimination, and to forbid the same, but, moreover, to direct the practice to be followed as to such subject for a future period, not exceeding two years, with power in the commission, if it finds reason to do so, to suspend, modify, or set aside the same, the order, however, to become operative without judicial action."

On pages 497 and 498 the court said:

"The court below deemed that it was its duty to award to the coal company the relief by mandamus which was prayed, upon the theory that section 23 of the act to regulate commerce rendered it imperative to do so, this conclusion being specially based upon the provision of that section authorizing the remedy of mandamus to compel carriers 'to furnish cars or other facilities for transportation for the party applying for the writ.' * * *

"That it is not necessary to point out that there is ample scope for giving effect to and applying the remedy embraced in section 23, if that section be construed in harmony with the act of which it forms a part, and not as destructive of one of the main purposes of the act, is, we think, obvious. It is to be observed that the section, besides

empowering the use of the writ of mandamus to compel the furnishing of cars and other facilities for transportation, also authorizes the use of that writ for the purpose of compelling the movement of traffic 'at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for
45 like traffic under similar conditions to any other shipper.' As it was settled in the Abilene case that the right to question in the courts the rates established in accordance with the act to regulate commerce without previous resort, by complaint, to the commission, in order to determine their unreasonableness, would be destructive of the act, and therefore was not permissible, that ruling is equally applicable to the provision as to furnishing cars contained in section 23, which is here relied upon."

After calling attention to the fact that mandamus provisions of section 23 of the act were added in 1889 the court said, pages 499 and 500:

"It being demonstrable, as we have seen, that to give to section 23 the broad meaning which the court below affixed to it would be to destroy or render inefficacious the remedial purposes of the amendments enacted in 1906, it must follow that such construction cannot be adopted, since to do so would compel us to hold that the wide and far-reaching remedies created by the amendments of 1906 were, in effect, destroyed by the narrower remedial processes which had been previously enacted in 1889. This conclusion being in reason impossible, it must follow that, construing the provisions of section 23 in the light of and in harmony with the amendments adopted in 1906, the remedy afforded by that section, in the cases which it embraces, must be limited either to the performance of duties which are so plain and so independent of previous administrative action of the commission as not to require a prerequisite exertion of power by that body, or to compelling the performance of duties which plainly arise from the obligatory force which the statute attaches to orders of the commission, rendered within the lawful scope of its authority, until such orders are set aside by the commission or enjoined by the courts."

In connection with the above quotation it should be stated that the provision of section 1 of the act whereby carriers are required to furnish cars upon reasonable request therefor was inserted in the act by the amendment of 1906.

46 In Robison v. B. & O. R. R. Co., 222 U. S., 506, the defendant railroad had charged 50 cents more per ton for a shipment of coal loaded from a wagon than from a tipple. Complainant shipped coal which was loaded from wagons, and alleging undue discrimination sued in a State court to recover as damages the excess paid over and above the rate for coal loaded from a tipple. But as the rate was part of a filed and published schedule and the commission had not acted in the premises, it was held that the doctrine of the Abilene case applied and the action did not lie.

In United States v. Pacific & Arctic Co., 228 U. S., 87, there was under consideration an indictment against the defendant railroad and three steamship companies alleging unlawful and unjust discrimination in the transportation of passengers and freight, in violation of the act to regulate commerce. It was charged that the defendants had entered into joint traffic arrangements for through routes and joint rates from Seattle, Wash., to interior Alaska points with certain steamship lines operating from Seattle to Skagway, Alaska, but had refused without cause or excuse to join with the Humboldt Company in like joint traffic arrangements. Although this was a criminal indictment, it was held that the courts lacked jurisdiction to entertain the questions involved, until the alleged discrimination had been passed upon by this commission. On pages 106, 107, and 108 of the opinion the following language is used:

"* * * The district court, as we have seen, decided that the conduct of the defendants was not subject to judicial review in a criminal or civil case until it had been submitted to and passed upon by the Interstate Commerce Commission. The Government attacks the conclusion with arguments of great strength and contends that it makes the commission not only the judges of
47 the civil relief that private shippers may be given against the carriers by the interstate commerce act, but gives the commission the control and practical determination of the criminal provisions of the law. The argument, in effect, is that the conclusion of the district court confounds the civil and criminal remedies of the law, the private injury and the public injury, resulting from the violation of its provisions. And who, it is asked, will initiate the criminal proceeding and by what proof will it be supported? What degree of proof is to be accorded to the finding of the commission—presumptive or conclusive? If neither, it is argued, 'it would be a senseless thing to regard such a finding as a condition precedent of the United States to indict.' If, it is asked further, the finding of the commission is to have either prima facie or conclusive effect, against whom is it to have such effect? If against a defendant, what becomes of the sixth amendment of the Constitution? The argument of the Government is cast in a series of questions which end in the final answer, as it is contended, that under the decision of the district court the Interstate Commerce Commission 'becomes practically the court of final criminal jurisdiction.'

"The contentions of the Government would be formidable indeed if the interstate commerce act was entirely criminal. But it is more regulatory and administrative than criminal. It has, it is true, a criminal provision against violations of its requirements, but some of its requirements may well depend upon the exercise of the administrative power of the commission. This view avoids the consequences depicted by the Government. It keeps separate the civil and criminal remedies of the act, each to be exercised in its proper circumstances. It makes the interstate commerce act what it was in-

tended to be and defined to be in the cases cited by the District Court, to wit: Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., and Baltimore & Ohio Railroad Co. v. Pitcairn Coal Co., supra. And it would in our judgment be an erroneous view to take that the great problems which the act was intended to solve and the great purposes it was intended to effect should be considered of less consequence than the facility which should be given to some
48 particular remedy, civil or criminal. We need not extend the discussion. The purpose of the interstate commerce act to establish a tribunal to determine the relation of communities, shippers, and carriers and their respective rights and obligations dependent upon the act has been demonstrated by the cited cases, and also the sufficiency of its powers to deal with the circumstances set forth in the indictment."

P. R. R. Co. v. International Coal Co., 230 U. S., 184, presented the following situation: On April 1, 1889, defendant increased its rates on coal from the Clearfield district. However, for the purpose of saving shippers against loss, it made a difference between what is called "free coal" and "contract coal." Under this practice, where coal had been sold for future delivery, the carrier collected the published rate, but rebated the difference between it and the lower rate in force when the contract of sale had been made. Plaintiff had no contracts overlapping April 1, 1889, and claiming to have been damaged, brought suit in a Federal court. It was argued that the court had no power to adjudicate the administrative question as to whether a carrier could make a difference in rate between shipments of free and contract coal. The court, however, held contrary to this contention. On pages 196 and 197 of the opinion the following language is used:

"Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates and the permissible discrimination based upon difference in conditions are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body so as to secure uniformity and to prevent the varying and sometimes conflicting
49 results that would flow from the different views of the same facts that might be taken by different tribunals.

"None of these considerations, however, operates to defeat the court's jurisdiction in the present case. For even if a difference in rates could be made between free and contract coal, none was made in the only way in which it could have been lawfully done. The published tariffs made no distinction between contract coal and free coal, but named one rate for all alike. That being true, only that single rate could be charged. When collected, it was unlawful,

under any pretense or for any cause, however equitable or liberal, to pay a part back to one shipper or to every shipper. The statute required the carrier to abide absolutely by the tariff. It did not permit the company to decide that it had charged too much and then make a corresponding rebate; nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper. February 4, 1887, 24 Stat., 379, c. 104, section 2; March 2, 1889, 25 Stat., 855, c. 382, section 6. Armour Co. v. United States, 209 U. S., 56, 83. The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the commission for reparation.

"In view of this imperative obligation to charge, collect, and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the commission by any order have made it valid. The rebate being unlawful, it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate and refunded a part to a particular class. This departure
50 from the published tariff was forbidden, and section 8, 24 Stat., 382, expressly provided that any carrier doing any act prohibited by the statute should be 'liable to the person injured thereby for the full amount of damages sustained in consequence of any such violation, together with reasonable attorney's fees.'"

In Mitchell Coal & Coke Co. v. P. R. R. Co., 230 U. S., 247, the coal company sued in the Federal courts for damage suffered because of the payment of rebates to other coal companies in the same field. The published tariff named the rate from station to destination, but it was usually construed to include the haul from the mines within the district to the station and was so applied upon all the shipments made by the plaintiff and its competitors. The defendant had paid to complainant's competitors so-called trackage or lateral allowances as compensation for hauling cars from their mines to the station. Defendant sought to justify the allowance, contending that because of dissimilar conditions it could itself haul plaintiff's cars from the mines but could not do so economically for the other mine operators. The Supreme Court held that whether or not the allowance was proper was an administrative question for this commission to pass upon and that hence the action did not lie, and on page 255 of its opinion said:

"But these claims of the parties emphasize the fact that there are two classes of acts which may form the basis of a suit for damages.

In one the legal quality of the practice complained of may not be definitely fixed by the statute so that an allowance, otherwise permissible, is lawful or unlawful, according as it is reasonable or unreasonable. But to determine that question involves a consideration and comparison of many and various facts and calls for the exercise of the discretion of the rate-regulating tribunal. The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of
51 a lawsuit when the action is based on the claim that unreasonable allowances have been paid. If the decision of such questions was committed to different courts with different juries the results would not only vary in degree, but might often be opposite in character, to the destruction of the uniformity in rate and practice which was the cardinal object of the statute."

On pages 256 and 257:

"It is argued that this conclusion ignores sections 9 and 22, which give the shipper the option of suing in the courts or applying to the commission. The same argument was made and answered in the Abilene case by showing that to permit suits based on the charge that a particular practice was unreasonable, without previous action by the commission, would repeal the many provisions of the statute requiring uniformity and equality. For, manifestly, such uniformity and equality cannot be secured by separate suits before separate tribunals involving the reasonableness of a rate or practice. The evidence might vary, and, of course, the verdicts would vary, with the result that one shipper would succeed before one jury and another fail before a different jury, where the reasonableness of the same practice was involved. Manifestly, different verdicts would occasion inequality between the two shippers, and it is equally manifest that if the commission had made one order of which both could avail themselves, there would have been one finding, of which one, two, or a score of shippers could equally avail themselves. The claim that this conclusion nullifies section 9 is concretely answered by the fact that the court has just decided to the contrary in Pennsylvania R. R. v. International Coal Co. There the carrier insisted that a suit for damages, occasioned by rebating, could not be maintained without preliminary action by the commission. This contention was overruled, and it was held that, for doing an act prohibited by the statute, the injured party might sue the carrier without previous action by the commission, because the courts could apply the law prohibiting a departure from the tariff to the facts of the case. But where the suit is based upon reasonable charges or unreasonable practices there is no law fixing what
52 is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the commission and not the courts should pass upon that administrative question. When such order is made it is as though the law for that particular practice had been fixed, and the courts could then

apply that order, not to one case, but to every case, thereby giving every shipper equal rights and preserving uniformity of practice. Section 9 gives the plaintiff the option of going before the commission or the courts for damages occasioned by a violation of the statute. But since the commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the commission that the practice or the rate was thus unreasonable and therefore illegal and prohibited."

On pages 258, 259, and 260:

"In considering the administrative questions as to the reasonableness, the elements of the problem are the same, whether they involve the validity of obsolete allowances, discarded tariffs, or current rates and practices. In both classes of cases there is a call for the exercise of the rate-regulating discretion and the same necessity for having the matter settled by a single tribunal. * * *

"As to past and present practices for allowances, the commission has the same power and there is the same necessity to take preliminary action. This was recognized in Texas &c. Ry. v. Abilene Co., 204 U. S., 426, where, after considering sections 8 and 22, relating to jurisdiction and the statutory and common law remedy, it was said that although a railroad might alter its rates voluntarily or in obedience to an order of the commission, yet it can 'not be doubted that the power of the commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force.'"

53 In Morrisdale Coal Co. v. P. R. R. Co., 230 U. S., 304, the matter complained of as undue discrimination was a long-abandoned method of coal-car distribution which operated to the alleged injury of the complaining coal company. Here, too, the courts held that a prior finding by the commission that the practice was unreasonable was essential to the cause of action. On page 313 of the opinion the court said:

"* * * the question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the commission. It was distinctly so ruled in the Pitcairn case, 215 U. S., 481, and in I. C. C. v Illinois Central, 215 U. S., 452. Those cases involve a consideration of the power of the commission over the distribution of cars and held that the courts could not by mandamus compel it to make a rule, nor by injunction restrain the enforcement of one it had promulgated. If in those direct proceedings the court could not pass upon the question of reasonableness of a method of allotting cars, neither can it do so as an incident to an action for damages.

"In view of the decision in the Abilene, Pitcairn, and Robinson cases, it is unnecessary again to discuss the statute or do more than

say that in this case the plaintiff was not entitled to maintain its action without producing an order of the commission that the rule adopted by the Pennsylvania Railroad was unreasonable."

Because of the importance of the subject, we have quoted at length the statements of the Supreme Court of the United States on the question of priority of jurisdiction as between the commission and the courts. We will now consider their bearing upon defendant's contentions. A careful examination of the language used by the Supreme Court shows that it has nowhere declared that there can be no concurrent jurisdiction of the commission and
54 the courts. True, it has stated that section 9 must be read in the light of the remainder of the act and can not be so interpreted as to defeat the purposes of the act. For that reason it was held that certain questions may not be brought before the courts for adjudication without a prior determination by this commission. The fallacy of defendant's reasoning becomes evident when we consider the reasons assigned by the court for not assuming original jurisdiction of administrative questions. In the Abilene case the court said that an interpretation of the act which would allow a shipper to obtain relief upon the basis that the established rate was unreasonable in the opinion of a court and jury would "destroy the prohibition against preference and discrimination" and would make it impossible to maintain "a uniform standard of rates." In other words, an opposite holding would have accomplished the very thing which the act to regulate commerce was intended to prevent. Can it be argued that if the commission assumed jurisdiction in the present case the accomplishment of the objects and purposes of the act would be endangered? It is obvious that such a contention can not be made. In the Mitchell case it is definitely stated that "section 9 gives the plaintiff the option of going before the commission or the courts for damages occasioned by a violation of the statute." The only exception made in any instance is that necessitated by the prior adjudication by the commission of an administrative question.

Furthermore, one can not escape the conclusion that the question as to the extent to which defendant failed to comply with the duty it owed complainants to furnish cars upon reasonable request therefor is an administrative one of which the commission alone can take original jurisdiction. This must be true unless it be the carrier's absolute duty to furnish cars at all times to the full extent of
55 the shipper's demands. Only then would this complaint present a question like that considered in P. R. R. Co. v. International Coal Co., supra. It may be that after the determination by the commission of the number of cars which the defendant should have furnished and of the times when it should have furnished them the courts would have concurrent jurisdiction with the commission of the ascertainment of the damages suffered by complainants by reason of defendant's failure to perform that duty. However, it is not a carrier's duty to furnish all cars demanded at

all times. In substance section 1 provides that upon reasonable request it shall be the duty of every carrier to furnish cars. By virtue of these requirements it becomes the carrier's duty to maintain a reasonably adequate car supply, and the question of what is a reasonably adequate car supply is just as much an administrative one as the question of what is a reasonable rate. The legal sufficiency of defendant's car supply can not be definitely fixed by the statute. It is a question which, using the language of the court in the Mitchell case, "involves a consideration and comparison of many and various facts and calls for the exercise of the discretion of" this tribunal.

It does not necessarily follow, however, that every case involving car supply must come first before this commission. It is obvious that if a carrier should absolutely refuse to furnish a shipper cars under any circumstances that would be a violation requiring no administrative determination, and the courts could take primary jurisdiction. It would be analogous to the situation presented in P. R. R. Co. v. International Coal Co., supra, or Dancigar v. Wells Fargo & Co., supra, and L. & N. R. R. Co. v. Cook Brg. Co., supra, to which defendant referred in its argument. In the latter case it was held to be unnecessary under the rule in the Abilene case for a shipper,

56 who had been refused transportation of liquor into dry territory because of the alleged prohibition of a State statute, to go to the commission before suing for a mandatory injunction to compel such service.

A large number of the cases now before the courts involving the adequacy of carriers' car supply, and which defendant contends must be held to be improperly before the courts should the commission have jurisdiction in the present case, are undoubtedly cases of the sort referred to in the preceding paragraph. So, also, cases involving the adequacy of car supply for intrastate shipments are obviously within the jurisdiction of State tribunals.

The distinction between a case involving car supply of which this commission has primary jurisdiction and a case which may be brought before the courts without a prior determination by the commission is clearly stated in United States v. L. & N. R. R. Co., 195 Fed., 88. In that case the United States Commerce Court was petitioned for a writ of mandamus commanding defendants to transport coal over the through routes and at the joint rates which had been established by them. It appears that there had been a controversy of long standing between defendants as to which carrier should furnish cars for loading at the mines of the petitioners. The court held:

"This court has no jurisdiction to consider the question of car distribution in advance of some action by the Interstate Commerce Commission or to determine how many cars the Southern Railway shall furnish or how many the Louisville & Nashville Railroad shall furnish for the transportation of the petitioners' coal. It is believed, however, that this court has the undoubted jurisdiction upon the

facts presented by the record to issue a writ or writs of mandamus, directed to these common carriers, commanding them that, so long as they establish and maintain through routes and joint rates to
57 southeastern territory, they shall move and transport in interstate commerce the coals of the petitioners when tendered in such reasonable quantities as may be determined either by agreement with the carriers or by the Interstate Commerce Commission if they can not agree."

Another decision of the Supreme Court of the United States which involves a question of car supply is C., R. I. & P. Ry. Co. v. Hardwick Elevator Co., 226 U. S., 426. In that case the court had under consideration the validity of a Minnesota statute which, among other things, undertook to penalize carriers in the sum of one dollar per car per day for failing to supply cars upon demand. The Supreme Court held that Congress had legislated upon the subject of furnishing cars and that State regulations, in so far as they applied to interstate shipments, must yield to the supreme power conferred upon Congress by the commerce clause of the Federal Constitution. Upon pages 434 and 435 of the opinion, after referring to the provisions of section 1 of the act requiring carriers to furnish cars upon reasonable request therefor, the court said:

"Not only is there then a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the act to regulate commerce give remedies for the violation of that duty. Thus, by section 8, is it provided 'that in case any common carrier subject to the provisions of this act * * * shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damage sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.' Further, by section 9, an election is given to either make complaint to the Interstate Commerce Commission or to bring in a designated court an action for the recovery of damages, and by section 10 it is made a criminal
58 offense for an employee of a corporation carrier to 'willfully omit or fail to do any act, matter, or thing in this act required to be done.'"

Although the question was not directly involved, it should be noted that the court states definitely that upon a carrier's failure to furnish cars for interstate traffic upon reasonable request therefor, an election is given, under section 9 of the act, either to make complaint to the Interstate Commerce Commission or to bring in a designated court an action for the recovery of damages.

Defendant has also called attention to certain rulings of this commission in situations alleged to be analogous to the present one, which, it is alleged, are inconsistent with the assumption of juris-

diction in the present case. Some of these rulings, such as the refusal of the commission to take jurisdiction to award damages for failure to deliver telegrams or for delay in shipments, clearly involve duties imposed on the carriers by the common law which are not referred to in the act to regulate commerce.

In Huerfano Coal Co. v. C. & S. E. R. R. Co., 28 I. C. C., 502, 506, the commission used the following language:

"It is the view of the commission that each carrier subject to the act is charged with the duty of furnishing cars to the industries located upon its line. In the case of through routes composed of two or more carriers the obligation to furnish cars for transportation over such through routes is joint upon the carriers therein. The law of this case, therefore, is that the Colorado & Southeastern Railroad, so long as it is to be considered as a common carrier, has the duty of furnishing cars for shipments between points on its line if there are any such shipments. Its obligation to furnish cars for shipments to points upon the lines of its connections is joint with such connections, and it can not be relieved of its portion of such joint liability by any contract with such connections."

59 Defendant's argument that the assumption of jurisdiction in the present case would be inconsistent with the mandamus provisions of section 23 of the act is completely answered in B. & O. R. R. Co. v. Pitcairn Coal Co., supra, where the court said that the remedy afforded by section 23—

"must be limited either to the performance of those duties which are so plain and so independent of previous administrative action of the commission as not to require a prerequisite exertion of power by that body, or to compelling the performance of duties which plainly arise from the obligatory force which the statute attaches to orders of the commission, rendered within the lawful scope of its authority, until such orders are set aside by the commission or enjoined by the courts."

There remains for consideration defendant's objection to the assumption of jurisdiction by the commission in the present case on the ground that it would violate the provisions of the seventh amendment to the Constitution, which guarantees a trial by jury in all controversies triable at common law and involving more than $20. Under the original act of 1887 the commission had no power to award damages, since that act provided no method for allowing the defendant the jury trial to which it was entitled under the seventh amendment. The amendment of March 2, 1889, to section 16 provided for a jury trial before the Federal courts at the request of the defendant in all cases wherein the commission awarded damages, thus removing the constitutional objection to an award of damages by the commission. Further changes were made in section 16 of the act by the amendments of June 29, 1906, and June 18, 1910, eliminating much of the language added in 1889. In the act as it now stands it is provided that suits to enforce the commission's orders for reparation "shall proceed in all respects like other civil suits for damages."

60 In this connection we call attention to the following from Mitchell Coal & Coke Co. v. P. R. R. Co., 230 U. S., 247, 258, where the court said with regard to orders of reparation by this commission.

"Such orders, so far as they are administrative, are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers who have been or may be affected by the rate can take advantage of the ruling and avail themselves of the reparation order. They are quasi judicial and only prima facie correct in so far as they determine the fact and amount of damage—as to which, since it involves the payment of money and taking of property, the carrier is by section 16 of the act given its day in court and the right to a judicial hearing."

From this it becomes evident that defendant would not be deprived of its rights under the seventh amendment should this commission assume jurisdiction in the present case.

Even if it were true that the commission and the courts have concurrent jurisdiction of this case, considerations of expediency should have no weight in deciding whether or not the commission should assume jurisdiction. The question of expediency was decided by Congress and is a matter reserved for the consideration of the legislative branch of the Government, into which we can not inquire. This commission must look to the act and the amendments thereto for guidance, and we are satisfied that under its provisions as interpreted by the Supreme Court of the United States it is our duty to determine the issues herein presented.

The jurisdictional question disposed of, we now direct attention to the complaints themselves. The periods during which it is alleged defendant failed to provide cars "upon reasonable request therefor," all of which were within two years prior to the filing of the complaints, are as follows: (1) September 1, 1911, to December

61 31, 1911; (2) January 1, 1912, to April 1, 1912; and (3) September 1, 1912, to April 1, 1913.

Statements filed in the record by complainants purport to show that due to the alleged car shortage they were unable to ship the following quantities of coal:

	First period.	Second period.	Third period.
	Tons.	*Tons.*	*Tons.*
Groom Coal Co.	15,200	13,400	21,255
Vulcan Coal & Mining Co.	34,803	21,681	56,382
St. Louis Coulterville Coal Co.	33,524	27,078	60,652

These results were attained as follows: The quantity of coal which complainants claim they could have shipped had the cars been supplied was arrived at by multiplying the basal rating of the mines, made for the purpose of car distribution, by 21, which complainants state represents a fair number of working days for each month.

This result, multiplied by the number of months in each period of car shortage, gave the tonnage which it is alleged could have been shipped during each period. Then was deducted the quantity shipped during the same period, and this gave the shortage claimed. Complainants also presented computations of their damages, based upon the loss of profits on the shipments, which, it is claimed, could have been made, and upon the greater cost of mining due to their restricted output. On complainants' request the general superintendent of transportation of the Illinois Central Railroad introduced in evidence a statement showing the percentage of ordered cars which were actually furnished during the car-shortage periods. The following percentages are shown for defendant's St. Louis division, on which complainants are located:

62 First period: September, 1911, 98 per cent; October, 1911, 56 per cent; November, 1911, 42 per cent; December, 1911, 67 per cent.

Second period: January, 1912, 33 per cent; February, 1912, 45 per cent; March, 1912, 39 per cent.

Third period: September, 1912, 61 per cent; October, 1912, 36 per cent; November, 1912, 33 per cent; December, 1912, 47 per cent; January, 1913, 68 per cent; February, 1913, 80 per cent; March, 1913, 84 per cent.

The figures from which these percentages were compiled include the cars which defendant furnished mines from which it purchased the entire output. If only the cars furnished commercial mines were considered the percentages would be still lower.

The necessity of maintaining an adequate car supply at coal mines is referred to in Interstate Commerce Commission v. I. C. R. R. Co., 215 U. S., 452, 460:

"It is conceded in argument that bituminous coal mines, which are the character of mines here involved, must dispose of their product as soon as the coal is delivered at the surface, as it is not practicable for an operator to store such coal, and the amount that a mine will produce is therefore directly dependent upon the quantity that can be taken away day by day. As a result of this situation, it is also conceded that railroads upon whose lines coal mines are situated pursue a system by which daily deliveries of cars, based upon requisitions of the respective mines, are made to such mines to permit of the removal of their available output for that day."

The period of greatest demand for coal cars is usually during the winter, when the operators can as a rule dispose of all the coal they are able to produce. Complainants contend that while carriers are not bound to provide in advance for extraordinary occasions or an unusual influx of freight, nor to furnish equipment to take care of a rush demand such as may occur in any given locality only temporarily and at long intervals, they should be required to provide

63 equipment and facilities sufficient for the prompt handling of the average normal tonnage produced under normal conditions during each recurring special season. It is stated that the failure

to furnish cars has been an annually recurring event on defendant's line.

Defendant severely criticises the basis upon which complainants seek to recover damages. The testimony would seem to show that on certain days included within the periods of car shortage set forth complainants were unable to furnish billing for coal which had been loaded into cars, and that at other times, due to breakdowns, the mines were not running. It is contended that complainants' allegations that they could have shipped as much coal as is represented by the rating of their respective mines is not supported by sufficient proof. However, the question of whether or not the complainants' method of arriving at the extent of the car shortage is proper has to do with the question of the amount of the damages, which was reserved for a subsequent hearing. The other matters referred to above deal with the same question. For the present it will suffice to note that complainants did not receive all the cars which they deemed necessary for the successful operation of their mines.

Defendant, however, further contends that its cars supply during the periods set forth was legally sufficient. Attention is called to additional purchases of coal cars and engines and of extensions of terminal facilities which have been made since 1911. It is submitted that defendant has made every reasonable effort to meet the increasing demand for equipment. The average number of coal cars per mile of track on defendant's railroad was given as 3.6 cars per mile in 1911, 3.9 cars per mile in 1913, and 4.3 cars per mile on January 1, 1914. A comparison made by defendant of its car supply per mile of track with the supply of other carriers in the
64 same vicinity tends to show that the Illinois Central has provided itself with equipment in excess of that of the other lines. As an explanation for whatever car shortage may be found to have existed during the periods specified, it is stated that the problem of distributing coal cars among a large number of mines of small capacity, such as those on defendant's line, is much more complicated and difficult than the problem of distributing the same amount of equipment among a small number of mines of relatively large capacity. It is further stated that the fact that much of the coal produced by mines on the Illinois Central goes to points beyond defendant's line adds to the difficulty of maintaining an adequate car supply. Finally, attention is called to the severe weather which prevailed during the winter of 1911–1912, and to a strike of the shop force and a large number of clerks on defendant's line, which, defendant claims, prevented it from supplying all the cars needed at all times.

As has already been said, a carrier can not be expected to maintain a car supply which will meet all demands of the coal operators at all seasons and under all conditions. Upon this point it was said in In re Irregularities in Mine Ratings, 25 I. C. C., 286, 293:

"If the carriers were to equip themselves with cars, motive power, tracks, and terminals so as to meet at any moment the

maximum demand for transportation, the shipping public would be obliged to pay interest upon that investment, and for the maintenance of those facilities."

However, although a full car supply can not be expected all the time, carriers must do more than to provide themselves with sufficient equipment for the slack period of coal production.

Another rule which has been recognized in the courts is that a carrier must assume the burden of explaiming or excusing its
65 failure to furnish cars. While the testimony offered by defendant explains to some extent its failure to furnish cars during the periods specified, it does not, in our opinion, present a complete excuse. It may safely be said that at least in so far as the car supply upon the St. Louis division is concerned defendant did not at all times meet the requirements of the act. The figures submitted by defendant's general superintendent of transportation show that during certain months of the car-shortage periods the car supply on the St. Louis division was as low as 33 per cent of the cars demanded. However, from this it does not follow that complainants were damaged by the carrier. Even though the car supply for the entire division upon which their mines are located was inadequate, the supply at their particular mines might have been adequate to meet all reasonable demands which they were in a position to make.

At the hearing complainants and defendant agreed not to go into the matter of the amount of damages to be recovered. The question of whether or not the car supply was legally adequate at these particular mines is so closely bound up with the question of the amount of damages that we have decided to leave both questions for a subsequent hearing.

CLARK, *Commissioner*, dissenting:

The commission is vested with broad powers and wide discretion. In part its duties are quasi judicial, but it is primarily and essentially an administrative body, exercising powers which are legislative in their nature and which are delegated to it by the Congress and are limited by the terms of the delegation. It is clearly our duty to observe and enforce the substantive and definite provisions of the act, with due consideration for the letter and the spirit of the law.

The operation of the railroads is inseparably bound up with
66 the commerce of the country. The demands upon the railroads are varied in their nature, and they vary greatly with changing conditions. It is therefore necessary, while observing the letter and the spirit of the law, to construe and administer it in workable ways and so that commerce and transportation will be promoted and not retarded.

In so far as Federal legislation and regulation go, the carriers have so far been left to exercise their own judgment in the construction of roads and the equipment thereof. The roads are built and operated by private owners and for financial profit. It is

therefore presumed that a carrier will, in so far as it is able to do so, provide itself with such facilities as will on the whole permit it to serve its patrons and earn the largest possible revenue, with proper consideration for judicious investment and proper economies.

The railroads are permitted to provide equipment by purchase, lease, or rental. In Interstate Commerce Commission v. I. C. R. R. Co., 215 U. S., 452, it was held that a railroad's car supply may be legally sufficient, and yet not sufficient to meet the demands of shippers in unforeseen contingencies, fluctuations in the demand for transportation, or unavoidable absence of equipment off the line.

As was stated in Investigation of Alleged Irregularities in Mine Ratings by the I. C. R. R. Co., 25 I. C. C., 286, 293:

"If the carriers were to equip themselves with cars, motive power, tracks, and terminals so as to meet at any moment the maximum demand for transportation, the shipping public would be obliged to pay interest upon that investment and for the maintenance of those facilities."

The demand far cars varies in different parts of the year and as between different years, dependent upon general conditions
67 of business, more or less bountiful crops, and climatic conditions. In a moderate winter we hear no complaints of shortage of cars for the transportation of coal, while in a severe winter such complaints are heard from all coal-producing sections. When there is a heavy crop of grain and a good market therefor there is a correspondingly heavy demand for cars for movement of grain, but under different conditions as to crop and market the demand for cars is correspondingly different. The same is true of the cotton crop. In 1907, a time of tremendous business activity, there was a general shortage of cars and terminal facilities, but that condition did not last, and since then there has been, as the reports show, a general surplus of idle cars.

The commission has never exercised, and has never been understood to possess, the power to require a carrier to enlarge its facilities or service or to award damages against a carrier for failure so to do. Certain properties, such as tracks, bridges, ferries, etc., are specified in the act as included in the term "railroad," but the act contains no suggestion that the commission is empowered to require a carrier to provide additional tracks, bridges, or ferries. The act declares it to be the duty of every carrier subject to its provisions to provide and furnish transportation upon reasonable request therefor, and defines the term "transportation" as including "all instrumentalities and facilities of shipment or carriage," including cars and other vehicles and all services in connection with the receipt, delivery, elevation, storage, etc., of property transported. If, therefore, the commission has power to require a carrier to provide itself with additional cars, or suffer awards of damages for failure so to do, it would follow that the commission has the same power to require a carrier to provide itself with an elevator, warehouse, or additional tracks, or to run ad-

ditional trains, or be subject to awards of damages for failure so to do.

68 The prime purposes of the law are to insure the public against unreasonable charges and secure service for the public that is free from unjust discrimination and undue prejudice. The railroad, including the parts thereof which are enumerated as embraced in the term "railroad" and the facilities specified as included in the term "transportation," is subject to the provisions of the act. This sets at rest all question as to whether or not those parts and facilities are subject to the regulatory power, and removes all doubt as to the right to use them, or any of them, in such way as to create or continue unjust discrimination or undue prejudice. All railroads existing and engaged in interstate transportation at the time the law became effective, and all subsequently constructed railroads similarly engaged, were brought within the terms and provisions of the act, but no obligation was laid upon any such railroad to extend its lines or enlarge the field of transportation in which it was engaged.

The act requires a carrier subject to its provisions, upon proper application, to construct, maintain, and operate on reasonable terms switch connections with lateral branch lines of railroad or private sidetracks, and to "furnish cars for the movement of such traffic to the best of its ability." This language seems to recognize the fact that the carrier may not, and probably will not, be able at all times to furnish desired cars, but it must furnish them "to the best of its ability" and without discrimination between shippers.

Section 7 of the act prohibits carriers from preventing the carriage of freight from being continuous from the place of shipment to the place of destination by carriage in different cars, break of bulk, stoppage, or interruption, which is not made in good faith for some necessary purpose.

69 Section 8 of the act provides that if a carrier shall do anything prohibited, or omit to do anything required of it, by the act, it shall be liable to the person injured for damages sustained in consequence thereof, together with reasonable counsel or attorney's fee, "to be fixed by the court in every case of recovery."

In section 20 of the act it is provided that the courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States, at the request of the commission alleging a failure to comply with, or violation of, any of the provisions of the act, to issue writs of mandamus commanding such carriers to comply with any provision of the act.

Section 23 of the act specifically confers upon the Federal courts jurisdiction, upon the relation of any person, firm, or corporation alleging such violation by a carrier of any provision of the act as prevents the relator from having interstate traffic moved at the same rates charged, or on as favorable conditions as those given to, any other shipper, to issue a mandamus commanding a carrier "to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ." Such

mandamus may issue notwithstanding any question of fact as to proper compensation to the carrier is undetermined, upon such terms as to security for payment as to the court may seem proper.

Under the well-known conditions of transportation by railroad, and responsive to the plain intent of the law as expressed by the prohibition hereinbefore referred to against interruption to through shipments, and the requirement that carriers shall establish and maintain through routes and joint rates, it is essential that cars shall be freely interchanged between carriers. The varying
70 conditions in different sections of the country at different seasons of the year and in different years render it, I believe, impracticable and impossible for the carrier which receives from a connection a loaded car to always deliver in return therefor an empty car. In addition to this there are multitudes of instances in which, and many times and seasons of the year when, such exchange of an empty for a load is neither desired nor desirable. The empty car may not be needed there, but may be badly needed at some other point or by some other connecting road.

A carrier being required to be a party to through routes and joint rates and to facilitate the movement of shipments without carriage in different cars or breaking of bulk, it follows that it must permit its cars to go to such destinations as are selected by the shipper. It can have no accurate knowledge of what those destinations will be. The shipper will naturally select the market which is most advantageous to him. He may, therefore, ship in one direction at one time and in another direction at another time. If the carrier must respond in damages because of its inability to furnish cars at a time of unusual demand for cars it seems to me that the right of that carrier to confine its equipment to its own rails must be recognized; but that right was specifically denied to the respondent in the instant case in Missouri & Illinois Coal Co. v. I. C. R. R. Co., 22 I. C. C., 39.

In the original act, as well as in amendments thereto which have broadened, extended, and strengthened the commission's jurisdiction and powers, the Congress has carefully refrained from transferring to, or conferring upon, the commission any jurisdiction or power which properly belongs to the judicial branch of the Government.

For all of these reasons, together with the fact that the com-
71 mission's orders for the payment of money are only prima facie evidence in the courts, in connection with which the court may receive additional testimony which has not been presented to the commission, I think that the question of requiring a carrier to provide itself with additional facilities or respond in damages for failure so to do is essentially a judicial question, jurisdiction of which reposes in the courts, which have authority to create and direct the conduct of receiverships, and not in the commission, which has been created to exercise certain delegated powers legislative in character. I am, therefore, unable to agree with the majority report.

I am authorized by Chairman Harlan and Commissioner Clements to say that they concur in these views.

By the commission.

GEORGE B. MCGINTY,
Secretary.

[SEAL.]

Petition and exhibits endorsed as follows: No. 1065. In the District Court of the United States, Eastern District of Illinois. Illinois Central Railroad Company, petitioner, vs. United States of America, respondent. In equity. Petition. R. V. Fletcher, solicitor for petitioner. Filed Sept. 7, 1915. C. P. Hitch, clerk.

72 And on the same day—to-wit, the 7th day of September, A. D. 1915—there was filed in the office of the clerk of said court a motion for temporary injunction, which said motion was and is in the words and figures following, to-wit:

73 In the District Court of the United States, Eeastern District of Illinois.

ILLINOIS CENTRAL RAILROAD COMPANY
vs.
UNITED STATES OF AMERICA. } Motion.

And now comes Illinois Central Railroad Company, petitioner in the above-styled cause, and moves the court that a temporary injunction be granted in this cause as prayed for and for the reasons set out in the petition on file.

R. V. FLETCHER,
Solicitor for Illinois Central Railroad Company.

Endorsed: Filed Sept. 7, 1915. C. P. Hitch, clerk.

74 And on the same day—to-wit, the 7th day of September, A. D. 1915—the following further proceedings were had in said court in said cause and were entered of record, to-wit:

75 In the District Court of the United States for the Eastern District of Illinois.

Tuesday, September 7, A. D. 1915. Present: Honorable Francis M. Wright, judge.

ILLINOIS CENTRAL RAILROAD COMPANY, PETITIONER,
vs.
UNITED STATES OF AMERICA, RESPONDENT. } In Equity.

On this 7th day of September, A. D. 1915, came the complainant, by R. V. Fletcher, its solicitor, and presented its application to the presiding judge of this court for an interlocutory injunction to

restrain the Interstate Commerce Commission, its officers and agents, as in and by the bill of complaint requested. Whereupon the said presiding judge does now immediately, as required by law, call to his assistance to hear and determine said application two other judges, namely, the Honorable Francis E. Baker, circuit
76 judge for the Seventh Circuit of the United States, and the Honorable J. Otis Humphrey, district judge for the Southern District of Illinois.

It is therefore ordered, adjudged, and decreed by the court that the said application for an interlocutory injunction be, and the same is hereby, set for hearing in this court at Danville, Illinois, on the 28th day of September, 1915, at 10 o'clock a. m., and notice thereof is directed to be given to the Interstate Commerce Commission and the Attorney General of the United States as required by law.

It is therefore ordered that the clerk of this court forthwith mail a certified copy of this order to each of the following: Interstate Commerce Commission, Washington, D. C.; the Attorney General of the United States, Washington, D. C.; Judge Francis E. Baker, Goshen, Indiana; Judge J. Otis Humphrey, Springfield, Illinois; R. V. Fletcher, solicitor for complainant, Chicago, Ill.

77 And afterwards—to-wit, on the 21st day of September, A. D. 1915—there was filed in the office of the clerk of said court, in said cause, a notice of motion for temporary injunction and for hearing on same, directed to Mr. Blackburn Esterline, special assistant to the Attorney General, and the acknowledgment of same, which said notice and acknowledgment were and are in the words and figures following, to-wit:

78 In the District Court of the United States for the Eastern District of Illinois.

Illinois Central Railroad Company *vs.* United States of America.	Motion.

And now comes Illinois Central Railroad Company, petitioner in the above-styled cause, and moves the court that a temporary injunction be granted in this cause as prayed for, and for the reasons set out in the petition on file.

(Signed) R. V. Fletcher,
Solicitor for Illinois Central Railroad Company.

Mr. Blackburn Esterline,
Special Assistant to the Attorney General,
Department of Justice, Washington, D. C.

Dear Sir: Please take notice that the above-styled motion has been filed in the U. S. District Court for the Eastern District of Illinois, and that the court has appointed September 28th, 1915, at 9 o'clock

a. m. as the time and Danville, Illinois, as the place for
79 hearing the same, at which time this motion will be submitted to the court.

R. V. FLETCHER,
Attorney for Illinois Central R. Co.

I acknowledge receipt of the above motion and notice this 18th day of September, 1915.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

Endorsed: Filed Sept. 21, 1915. Chas. P. Hitch, clerk.

80 And afterwards—to-wit, on the 25th day of September, A. D. 1915—there was filed in the office of the clerk of said court the motion of the United States to dismiss the petition for want of jurisdiction, which said motion was and is in the words and figures following, to-wit:

81 In the District Court of the United States, Eastern District of Illinois.

ILLINOIS CENTRAL RAILROAD COMPANY, petitioner, *v.* UNITED STATES OF AMERICA, RESPONDENT.	In Equity, No. 1065.

Motion of the United States to dismiss the petition.

Comes now the United States of America, by its counsel, and moves the court to dismiss the petition in the above-entitled cause for want of jurisdiction.

As grounds for this motion it is shown—

1. The action of the Interstate Commerce Commission in fixing for hearing the complaints referred to, and the notice thereof, do not constitute an order within the meaning of section 1 of the act entitled "An act to create a Commerce Court," etc., approved June 18, 1910, and the court has no jurisdiction to enjoin, set aside, annul, or suspend the same in whole or in part.

2. The petition does not seek to enjoin, set aside, annul, or suspend in whole or in part an order of the Interstate Commerce Commission within the meaning of section 1 of an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910, but
82 it is an attempt, in advance of any action or order, to enjoin the Interstate Commerce Commission, its members, officers, employees, and agents, from acting and proceeding on a complaint brought and pending before it.

3. The act to regulate commerce, as amended, provides that an order for the payment of money shall be prima facie evidence in a civil suit commenced within one year after the order is entered.

The statute cuts off no defense in such civil suit, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either the court or the jury; it does not take away the trial by jury or any of its incidents; nor does it in any wise work a denial of due process of law. Such an order is merely a rule of evidence, and notice of a hearing at which such an order may be entered is not an order within the meaning of section 1 of the act entitled "An act to create a Commerce Court,' etc., approved June 18, 1910, and the court has no jurisdiction to enjoin, set aside, annul, or suspend the same in whole or in part.

Wherefore, respondent prays that its motion be sustained.

BLACKBURN ESTERL[illegible],
Special Assistant to the Attorney General.
CHARLES A. KARCH,
United States Attorney, Eastern District of Illinois.

Endorsed: Filed Sept. 25, 1915. Chas. P. Hitch, clerk.

83 And afterwards—to wit, on the 28th day of September, A. D. 1915—the following further proceedings were had in said court in said cause and entered of record, to wit:

84 In the District Court of the United States for the Eastern District of Illinois.

Tuesday, September 28, A. D. 1915. Present: Hon. Francis E. Baker, United States Circuit Judge, Seventh Judicial Circuit; Hon. J. Otis Humphrey, United States District Judge, Southern District of Illinois; and Hon. Francis M. Wright, United States District Judge, Eastern District of Illinois.

ILLINOIS CENTRAL RAILROAD COMPANY, *v.* UNITED STATES OF AMERICA.	In Equity.

This cause came on for hearing on the motion of the United States to dismiss the petition for want of jurisdiction and the same was argued by counsel.

On consideration thereof, it is ordered, adjudged, and decreed that the said motion be and the same is hereby overruled; to which ruling of the court the counsel for the United States then and there objected and excepted.

85 And on the same day—to wit, the 28th day of September, A. D. 1915—there was filed in the office of the clerk of said court in said cause the appearance of the Interstate Commerce Commission, which said appearance was and is in the words and figures following, to wit:

86 In the District Court of the United States for the Eastern District of Illinois.

THE ILLINOIS CENTRAL RAILROAD COMPANY, complainant,
v.
THE UNITED STATES OF AMERICA, DEFENDANT. } In Equity. No. 1065.

Appearance of the Interstate Commerce Commission.

We hereby enter the appearance of the Interstate Commerce Commission and of ourselves as counsel in the above entitled cause.

JOSEPH W. FOLK,
EDWARD W. HINES,
Counsel for the Interstate Commerce Commission.

Endorsed: Filed Sept. 28, 1915. C. P. Hitch, clerk.

87 And on the same day—to wit, the 28th day of September, A. D. 1915—there was filed in the office of the clerk of said court the motion of the United States to dismiss the petition of complainant, which said motion was and is in the words and figures following, to wit:

88 In the District Court of the United States for the Eastern District of Illinois.

ILLINOIS CENTRAL RAILROAD COMPANY,
v. In Equity. No. 1065.
UNITED STATES OF AMERICA.

Motion of the United States to dismiss the petition.

Comes now the United States, not waiving its motion to dismiss the petition for want of jurisdiction, but insisting upon the same now and at all times hereafter, and moves the court to dismiss the petition for that the same is without equity on its face and does not state any cause of action against the respondent.

BLACKBURN ESTERLINE,
Special assistant to the Attorney General.

Endorsed: Filed Sept. 28, 1915. C. P. Hitch, clerk.

89 And on the same day—to wit, on the 28th day of September, A. D. 1915—there was filed in the office of the clerk of said court in said cause, the motion to dismiss and answer of Interstate Commerce Commission, which said motion and answer were and are in the words and figures following, to wit:

90 In the District Court of the United States for the Eastern District of Illinois.

ILLINOIS CENTRAL RAILROAD COMPANY, petitioner, *v.* THE UNITED STATES OF AMERICA, respondent.	In Equity, No. 1065.

Motion to dismiss and answer of the Interstate Commerce Commission.

The Interstate Commerce Commission having entered its appearance herein, now comes and moves to dismiss the petition herein for the following reasons:

(1) The writing described in the petition as an "order" is merely a notice of a hearing, and not an "order" within the meaning of that word as used in the act to regulate commerce, or in the act of Congress of October 22, 1913, which abolishes the Commerce Court and fixes the venue of and the procedure in suits to set aside orders of the Interstate Commerce Commission.

(2) The principal office of the Interstate Commerce Commission is in the city of Washington, and a suit to enjoin the commission from proceeding in a cause pending before it, if such a suit were
91 to be brought at all, must be brought in the District of Columbia and not in the Eastern District of Illinois.

(3) The petitioner has an adequate remedy at law.

(4) The petition fails to show that the petitioner will suffer irreparable injury if the injunction is not granted.

(5) The Interstate Commerce Commissioner has jurisdiction of the complaints the hearing of which is sought to be enjoined.

I.

Without waiving its motion to dismiss or its objection to the jurisdiction of the court this intervening respondent for answer to paragraphs 1, 2, 3, 4, 5, 6, 7, and 8 of the petition admits the statements of said paragraphs except so far as said statements may be inconsistent with the findings made and conclusions stated by this respondent in its report in said causes No. 6128, No. 6128 (Sub-No. 1), and No. 6128 (Sub-No. 2), which report is herewith filed as a part hereof, marked "Exhibit A."

II.

For answer to the ninth paragraph of the petition this intervening respondent denies that at the argument of said causes so much of the complaint in each of said causes as charged undue and unlawful discrimination on the part of petitioner in distributing coal cars was

dismissed, and denies that it was then and there stipulated of record that the said complaints or any of them should be considered
92 as so amended as to omit all charges of undue and unlawful discrimination, and denies that thereafter the said causes proceeded upon the sole issue of damages for alleged failure to furnish cars upon demand.

III.

For answer to paragraphs 10 and 11 of the petition this intervening respondent admits the statements of each of said paragraphs, except so far as said statements may be inconsistent with the findings made and conclusions stated by this respondent in its report in said causes No. 6128, No. 6128 (Sub-No. 1), and No. 6128 (Sub-No. 2).

IV.

For answer to paragraph 12 of the petition this respondent denies that after the petition for rehearing filed by the complainant had been denied by this respondent, or on the 18th day of August, 1915, or at any other time the commission entered its order assigning the said causes for further hearing upon the issue of reparation, and denies that the writing set forth in said paragraph and described therein as an order was in fact an order or anything other than a notice of a hearing to be held at the time and place named therein.

V.

For answer to paragraph 13 of the petition this respondent admits the allegations of said paragraph.

93 VI.

For answer to paragraph 14 of the petition this respondent denies that it is without jurisdiction in the premises, or is not vested under the laws of the United States with authority to entertain complaints of the character of those described in the petition or to make any order or take any action with respect thereto, or is without jurisdiction to award damages against petitioner for failing to furnish cars when demanded.

VII.

For answer to paragraph 15 of the petition this respondent denies that unless its order setting down this cause for further hearing on the issue of damages be canceled, annulled, and set aside, or unless further action in the premises by the said commission be enjoined and restrained the petitioner will be compelled to attend the hearing at St. Louis, Mo., on October 1, 1915, or at any other time, or will

be put to great expense and trouble to make proper defense thereto. This respondent further states in answer to said paragraph that it does not know and has no means of knowing whether or not in all probability orders will be entered by it awarding reparation to the complainants in the said complaints before this respondent, and that no such orders will be entered unless they are authorized by the facts developed upon said hearing in connection with the facts already developed. This intervening respondent further denies that
94 petitioner will be forced to defend at great trouble and expense three separate and several suits at law based on any awards which may be entered by this respondent, and denies that petitioner will be thereby subjected to a multiplicity of suits at law. This intervening respondent further denies that in the event reparation is awarded by it the petitioner will be placed at a great disadvantage in defending suits at law based upon such awards.

VIII.

For further answer herein this respondent states that it has full and complete jurisdiction of the proceedings referred to in the petition, and full power and authority to hear the motion and things therein complained of, and to make such order or orders in the premises as may be warranted by the evidence now in the record and by that which may be introduced upon the proposed hearing.

IX.

Wherefore, having fully answered, this respondent prays that the petition be dismissed at the cost of petitioner and for such other and further relief as may be appropriate in the premises.

JOSEPH W. FOLK,
EDWARD W. HINES,
Counsel for Interstate Commerce Commission.

95 CITY OF WASHINGTON,
District of Columbia, ss.:

I, W. M. DANIELS, on oath, depose and say that I am a member of the Interstate Commerce Commission and make this affidavit on behalf of said commission; that I have read the foregoing answer and know the contents thereof, and that the same is true.

Subscribed and sworn to before me, a notary public within and for the District of Columbia, this 25th day of September, A. D. 1915.

[SEAL.] ALFRED HOLMEAD,
Notary Public.

My commission expires July 23, 1919.

96 EXHIBIT A.

97 Interstate Commerce Commission. No. 6128—Vulcan Coal & Mining Company v. Illinois Central Railroad Company. No. 6128 (Sub-No. 1)—St. Louis-Coulterville Coal Company v. Same. No. 6128 (Sub-No. 2)—Groom Coal Company v. Same.

98 VULCAN COAL & MINING COMPANY
v.
ILLINOIS CENTRAL RAILROAD COMPANY. } No. 6128.

ST. LOUIS-COULTERVILLE COAL COMPANY
v.
SAME. } No. 6128 (Sub-No. 1).

GROOM COAL COMPANY
v.
SAME. } No. 6128 (Sub-No. 2).

Submitted April 9, 1914. Decided January 30, 1915.

Complainants request reparation for damages occasioned by the alleged failure of the defendant upon reasonable request to furnish cars for the shipment of coal from complainants' mines; defendant denies the Commission's jurisdiction and argues that the question raised is one for the determination of the courts; Held:

1. The question as to the extent to which defendant failed to comply with the duty it owed complainants is an administrative one, of which the Commission alone can take original jurisdiction.
2. It is obvious that the absolute refusal of a carrier to furnish a shipper cars would be a violation requiring no administrative determination and of which the courts could take primary jurisdiction.
3. Considerations of expediency should have no weight in deciding whether or not the commission should assume jurisdiction.
4. Reference made to cases dealing with the question of priority of jurisdiction as between the commission and the courts.
5. The assumption of jurisdiction in the present case is not inconsistent with the mandamus provisions of section 23 of the act. B. & O. R. R. Co. v. Pitcairn Coal Co., 215 U. S., 481.
6. Defendant is not deprived of its rights under the seventh amendment to the Constitution.
7. A carrier must do more than provide itself with sufficient equipment for the slack period of coal production.
8. A carrier must assume the burden of explaining or excusing its failure to furnish cars.

9. The question of whether or not the car supply was reasonably adequate at these particular mines and the question of the amount of damages, if any, left for a subsequent hearing.

R. W. Ropiequet and Winkleman & Ogle for complainants; R. V. Fletcher for defendant.

99 *Report of the commission.*

MEYER, Commissioner:

Three complaints are under consideration in this case, identical both as to their averments and as to the character of proof offered. The complainants operate coal mines at Belleville and Coulterville, Ill., on the line of defendant's railroad. They allege that during certain periods of 1911, 1912, and 1913, defendant failed upon request to furnish a reasonably adequate supply of cars for the shipment of coal from their mines. We are asked to award reparation equal to the loss of profits on interstate shipments of coal which would have been made had the car supply been reasonable, plus the greater cost of mining due to restricted output. The complaints as originally drawn included a prayer for damages on account of the alleged failure of defendant to distribute its available equipment upon a nondiscriminatory basis, but upon the argument the issues were narrowed to a consideration of the reasonableness of the car supply during the periods in question.

The first question which presents itself is one of jurisdiction. In its answer and upon the hearing and argument defendant contends that we are without jurisdiction to award damages on account of any alleged failure on its part to furnish equipment. It is argued that this is a question for the determination of the courts.

Section 1 of the act to regulate commerce, as amended June 29, 1906, provides, in part, that—

"* * * the term 'transportation' shall include cars * * * and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor. * * *"

Section 8 of the act provides—

"That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

Section 9 of the act provides, in part—

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not
100 have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

Section 13 of the act gives the commission jurisdiction upon complaint of anything done or omitted to be done in contravention of the provisions of the act by any common carrier subject to its provisions, and, in the event of a failure of the carrier to satisfy the complaint, provides for investigation by the commission. In the case of an investigation it is by section 14 of the act made the duty of the commission to state its conclusions in writing, together with its decision, order, or requirement in the premises, and, in case damages are awarded, the findings of fact on which the award is made.

Although it is recognized by defendant that the provisions of section 1 of the act above referred to specifically impose upon carriers the duty to furnish cars for interstate traffic upon reasonable requests therefor, it is argued that it does not necessarily follow that this commission has jurisdiction to award damages consequent upon a carrier's failure to perform this duty. Attention is called to several sections of the act regulating matters which it is asserted must obviously be committed to the courts. Thus, by section 20 it is made the duty of each railroad company to issue a bill of lading, and it is provided that the initial carrier shall be responsible for all damages even though they be caused by a connecting carrier. By section 23 jurisdiction is conferred upon the courts of the United States to entertain petitions for writs of mandamus to compel common carriers to move and transport traffic and to furnish cars. Other provisions of the act provide for criminal prosecution, and it is submitted that this commission would not sit as a criminal court to decide whether the act has been violated and to impose punishment therefor. It is argued that these provisions of the act indicate that some things therein contained are for the commission to decide, and other matters are left to the courts.

Based on the decision of the Supreme Court in T. & P. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S., 426, defendant contends that if the commission has jurisdiction in a case of this sort, the courts have not, and conversely, if the courts have jurisdiction the commission has not. It claims that in this decision the Supreme Court has read out of section 9 of the act that provision which gives any person claiming to be injured by any common carrier subject to the provisions of the act the election either to bring his complaint before the commission or to bring suit in a court of competent juris-

diction. Consequently, it is argued that when the complainant in this case asks for an order of reparation at the hands of the commission it is a denial of the jurisdiction of the court. In further support of this position defendant calls attention to B. &
101 O. R. R. Co. v. Pitcairn Coal Co., 215 U. S., 481; P. R. R. Co. v. International Coal Mining Co., 230 U. S., 184; Morrisdale Coal Co. v. P. R. R. Co., 230 U. S., 304; S. Ry. Co. v. Reid, 222 U. S., 424; and Mitchell Coal Co. v. P. R. R. Co., 230 U. S., 247. These cases will be discussed in detail later on. Defendant argues that suits for damages on account of failure to furnish cars are among the matters mentioned in the act to regulate commerce with which the commission is not called upon directly to deal, and jurisdiction in regard to which is obviously conferred upon the courts.

It is further contended that, under the seventh amendment to the Federal Constitution, the question here under consideration requires a jury trial, of which the defendant will be deprived should the commission assume jurisdiction.

It is urged that the commission has not heretofore entertained the view that it has jurisdiction in controversies of this character. Defendant calls attention to the following conference rulings and decisions wherein we have refused to take jurisdiction in situations which defendant alleges are analogous to the one presented in the present case: Conference Rulings Nos. 127, 296, 317, and 384; Council v. W. & A. R. R. Co., 1 I. C. C., 339; New Orleans Cotton Exchange v. I. C. R. R. Co., 3 I. C. C., 534; Loud v. S. C. R. R. Co., 5 I. C. C., 529; Duncan v. A., T. & S. F. R. R. Co., 6 I. C. C., 85; Jones v. St. L. & S. F. R. R. Co., 12 I. C. C., 144; Blume & Co. v. Wells, Fargo & Co., 15 I. C. C., 53; Royal Brewing Co. v. Adams Express Co., 15 I. C. C., 255; Joynes v. P. R. R. Co., 17 I. C. C., 361; Hillsdale Coal & Coke Co. v. P. R. R. Co., 19 I. C. C., 356; Ponchatoula Farmers Asso. v. I. C. R. R. Co., 19 I. C. C., 513; Buffalo Hardwood Lumber Co. v. B. & O. S. W. R. R. Co., 21 I. C. C., 536; and Richmond-Eureka Mining Co. v. E. N. Ry. Co., 29 I. C. C., 62.

Attention is also called to the decision of the United States Circuit Court for the Western District of Missouri in Danciger v. Wells, Fargo & Co., 154 Fed., 379, and to the decision of the Supreme Court of the United States in L. & N. R. R. Co. v. Cook Brewing Co., 223 U. S., 70, as holding, according to defendant's interpretation of these opinions, that the commission has no jurisdiction to award damages in case shipments have been refused by a carrier. It is argued that there can be no distinction in principle between the refusal on the part of a carrier to accept shipments and the failure on the part of the same carrier to furnish needed equipment. These cases will also be given consideration later on. Defendant states that numerous cases of the failure of carriers to furnish cars have been entertained by the courts, and that the causes have proceeded to judgment without any point having been made as to the necessity of prerequisite action by the commission. If such action by the commission

102 be necessary, it is alleged that a large number of cases now before the courts are not properly there.

Reverting again to section 23 of the act and its bearing upon the present case, the question is asked how the theory that the determination of the legal sufficiency of the car supply must be primarily submitted to the commission can be reconciled with the provisions of section 23, which commit to the courts the right to issue writs of mandamus to compel carriers to move traffic and furnish cars. It is argued that whether the suit be for mandamus under section 23 or whether it be for damages, as in the instant case, the question in both cases must be to find out whether the car supply was legally sufficient. A further contention made by defendant is that as a matter of expediency this commission should not take jurisdiction of such matters as those herein involved. Defendant fears that if complaints of this character are recognized by the commission it will be seriously handicapped by lack of time to devote to important questions clearly committed to it by the provisions of the act.

The leading case on the question of priority of jurisdiction as between the commission and the courts is T. & P. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S., 426. In that case suit was brought in a State court to recover damages consequent upon the exaction by the defendant carrier, on an interstate shipment, of an alleged unreasonable rate. The rate charged was stated in a schedule duly filed and published in accordance with the act to regulate commerce. This commission had never passed on its legality. The Supreme Court refused to construe the act as conferring any right to recover damages for unreasonable charges prior to a finding by the commission. On pages 440 and 441 of the opinion in the Abilene case the court said—

"* * * if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the commission, finding the established rate to be unreasonable and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. * * * For if, without previous action by the commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed the recognition of such a right is wholly inconsistent with the adminis-

103 trative power conferred upon the commission and with the duty, which the statute casts upon that body, of seeing to it

that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted."

On pages 441 and 442, the effect of section 9 of the act is thus defined:

"Nor is there merit in the contention that section 9 of the act compels to the conclusion that it was the purpose of Congress to confer power upon courts primarily to relieve from the duty of enforcing the established rate by finding that the same as to a particular person or corporation was so unreasonable as to justify an award of damages. True it is that the general terms of the section when taken alone might sanction such a conclusion, but when the provision of that section is read in connection with the context of the act and in the light of the considerations which we have enumerated we think the broad construction contended for is not admissible. And this becomes particularly cogent when it is observed that the power of the courts to award damages to those claiming to have been injured, as provided in the section, contemplates only a decree in favor of the individual complainant, redressing the particular wrong asserted to have been done, and does not embrace the power to direct the carrier to abstain in the future from similar violations of the act—in other words, to command a correction of the established schedules—which power, as we have shown, is conferred by the act upon the commission in express terms. In other words, we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of. Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force."

This case was followed by B. & O. R. R. Co. v. Pitcairn Coal Co., 215 U. S., 481. In that case the coal company filed a petition of mandamus in the Federal courts, under section 23 of the act to prevent an alleged discrimination in the distribution of coal cars pursuant to a

regulation of the defendant carrier. The petition was dismissed because the matter had not been first submitted to this commission. On pages 493 and 494 of its opinion the Supreme Court said:

"The controversy is controlled by the considerations which governed the ruling in Texas & Pacific Ry. Company v. Abi-
104 lene Cotton Oil Co., 204 U. S., 426. * * * The ruling there made dealt with the provisions of the act as they existed prior to the amendments adopted in 1906, and when those amendments are considered they render, if possible, more imperative the construction given to the act by that ruling, since, by section 15, as enacted by the amendment of June 29, 1906, the commission is empowered, indeed it is made its duty, in disposing of a complaint, not only to determine the legality of the practice alleged to give rise to an unjust preference or undue discrimination, and to forbid the same, but, moreover, to direct the practice to be followed as to such subject for a future period, not exceeding two years, with power in the commission, if it finds reason to do so, to suspend, modify, or set aside the same, the order, however, to become operative without judicial action."

On pages 497 and 498 the court said:

"The court below deemed that it was its duty to award to the coal company the relief by mandamus which was prayed, upon the theory that section 23 of the act to regulate commerce rendered it imperative to do so, this conclusion being specially based upon the provision of that section authorizing the remedy of mandamus to compel carriers 'to furnish cars or other facilities for transportation for the party applying for the writ.' * * *

"That it is not necessary to point out that there is ample scope for giving effect to and applying the remedy embraced in section 23, if that section be construed in harmony with the act of which it forms a part, and not as destructive of one of the main purposes of the act, is, we think, obvious. It is to be observed that the section, besides empowering the use of the writ of mandamus to compel the furnishing of cars and other facilities for transportation, also authorizes the use of that writ for the purpose of compelling the movement of traffic 'at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper.' As it was settled in the Abilene case that the right to question in the courts the rates established in accordance with the act to regulate commerce without previous resort, by complaint, to the commission, in order to determine their unreasonableness, would be destructive of the act, and therefore was not permissible, that ruling is equally applicable to the provision as to furnishing cars contained in section 23, which is here relied upon."

After calling attention to the fact that mandamus provisions of section 23 of the act were added in 1889, the court said, pages 499 and 500:

"It being demonstrable, as we have seen, that to give to section 23 the broad meaning which the court below affixed to it would be to de-

stroy or render inefficacious the remedial purposes of the amendments enacted in 1906, it must follow that such construction can not be adopted, since to do so would compel us to hold that the wide and far-reaching remedies created by the amendments of 1906 were, in effect, destroyed by the narrower remedial process which had been previously enacted in 1889. This conclusion being in reason impossible, it must follow that, construing the provisions of section 23 in the light of and in harmony with the amendments adopted in 1906, the remedy afforded by that section, in the cases which it embraces, must be limited either to the performance of duties which are so plain and so independent of previous administrative action of the commission as not to require a prerequisite exertion of power by that body, or to compelling the performance of duties which plainly arise from the obligatory force which the statute attaches to orders of the commission, rendered within the lawful scope of its authority, until such orders are set aside by the commission or enjoined by the courts."

In connection with the above quotation it should be stated that the provision of section 1 of the act whereby carriers are required to furnish cars upon reasonable request therefor, was inserted in the act by the amendment of 1906.

In Robinson v. B. & O. R. R. Co., 222 U. S., 506, the defendant railroad had charged 50 cents more per ton for a shipment of coal loaded from a wagon than from a tipple. Complainant shipped coal which was loaded from wagons and alleging undue discrimination sued in a State court to recover as damages the excess paid over and above the rate for coal loaded from a tipple. But as the rate was part of a filed and published schedule and the commission had not acted in the premises, it was held that the doctrine of the Abilene case applied and the action did not lie.

In United States v. Pacific & Arctic Co., 228 U. S., 87, there was under consideration an indictment against the defendant railroad and three steamship companies alleging unlawful and unjust discrimination in the transportation of passengers and freight, in violation of the act to regulate commerce. It was charged that the defendants had entered into joint traffic arrangements for through routes and joint rates from Seattle, Wash., to interior Alaska points with certain steamship lines operating from Seattle to Skagway, Alaska, but had refused without cause or excuse to join with the Humboldt Company in like joint traffic arrangements. Although this was a criminal indictment, it was held that the courts lacked jurisdiction to entertain the questions involved, until the alleged discrimination had been passed upon by this commission. On pages 106, 107, and 108 of the opinion the following language is used:

" * * * The district court, as we have seen, decided that the conduct of the defendants was not subject to judicial review in a criminal or civil case until it had been submitted to and passed upon by the Interstate Commerce Commission. The Government attacks the conclusion with arguments of great strength and contends that

it makes the commission not only the judges of the civil relief that private shippers may be given against the carriers by the interstate commerce act, but gives the commission the control and practical determination of the criminal provisions of the law. The argument, in effect, is that the conclusion of the district court confounds the civil and criminal remedies of the law, the private injury and the public injury, resulting from the violation of its provisions. And who, it is asked, will initate the criminal proceeding and by what proof will it be supported? What degree of proof is to be accorded to the finding of the commission—presumptive or conclusive? If neither, it is argued, 'it would be a senseless thing to regard such a finding as a condition precedent of the United States to indict.' If, it is asked further, the finding of the commission is to have either prima facie or conclusive effect, against whom is it to
106 have such effect? If against a defendant, what becomes of the sixth amendment of the Constitution? The argument of the Government is cast in a series of question which end in the final answer, as it is contended, that under the decision of the district court the Interstate Commerce Commission 'becomes practically the court of final criminal jurisdiction.'

"The contentions of the Government would be formidable indeed if the interstate commerce act was entirely criminal. But it is more regulatory and administrative than criminal. It has, it is true, a criminal provision against violations of its requirements, but some of its requirements may well depend upon the exercise of the administrative power of the commission. This view avoids the consequences depicted by the Government. It keeps separate the civil and criminal remedies of the act, each to be exercised in its proper circumstances. It makes the interstate commerce act what it was intended to be and defined to be in the cases cited by the district court, to wit: Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., and Baltimore & Ohio Railroad Co. v. Pitcairn Coal Co., supra. And it would in our judgment be an erroneous view to take that the great problems which the act was intended to solve and the great purposes it was intended to effect should be considered of less consequence than the facility which should be given to some particular remedy, civil or criminal. We need not extend the discussion. The purpose of the interstate commerce act to establish a tribunal to determine the relation of communities, shippers, and carriers and their respective rights and obligations dependent upon the act has been demonstrated by the cited cases, and also the sufficiency of its powers to deal with the circumstances set forth in the indictment."

P. R. R. Co. v. International Coal Co., 230 U. S. 184, presented the following situation: On April 1, 1889, defendant increased its rates on coal from the Clearfield district. However, for the purpose of saving shippers against loss, it made a difference between what is called "free coal" and "contract coal." Under this practice, where coal had been sold for future delivery, the carrier collected the published rate, but rebated the difference between it and the lower rate

in force when the contract of sale had been made. Plaintiff had no contracts overlapping April 1, 1889, and claiming to have been damaged, brought suit in a Federal court. It was argued that the court had no power to adjudicate the administrative question as to whether a carrier could make a difference in rate between shipments of free and contract coal. The court, however, held contrary to this contention. On pages 196 and 197 of the opinion the following language is used:

"Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates and the permissible discrimination based upon difference in conditions are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals.

107 "None of these considerations, however, operates to defeat the court's jurisdiction in the present case. For even if a difference in rates could be made between free and contract coal, none was made in the only way in which it could have been lawfully done. The published tariffs made no distinction between contract coal and free coal, but named one rate for all alike. That being true, only that single rate could be charged. When collected, it was unlawful, under any pretense or for any cause, however equitable or liberal, to pay a part back to one shipper or to every shipper. The statute required the carrier to abide absolutely by the tariff. It did not permit the company to decide that it had charged too much and then make a corresponding rebate; nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper. February 4, 1887, 24 Stat., 379, c. 104, section 2; March 2, 1889, 25 Stat., 855, c. 382, section 6. Armour Co. v. United States, 209 U. S., 56, 83. The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the commission for reparation.

"In view of this imperative obligation to charge, collect, and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the commission by any order have

made it valid. The rebate being unlawful, it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate and refunded a part to a particular class. This departure from the published tariff was forbidden, and section 8, 24 Stat., 382, expressly provided that any carrier doing any act prohibited by the statute should be 'liable to the person injured thereby for the full amount of damages sustained in consequence of any such violation, together with reasonable attorney's fees.'"

In Mitchell Coal & Coke Co. v. P. R. R. Co., 230 U. S., 247, the coal company sued in the Federal courts for damage suffered because of the payment of rebates to other coal companies in the same field. The published tariff named the rate from station to destination, but it was usually construed to include the haul from the mines within the district to the station and was so applied upon all the shipments made by the plaintiff and its competitors. The defendant had paid to complainant's competitors so-called trackage or lateral allowances as compensation for hauling cars from their mines to the station. Defendant sought to justify the allowance, contending that because of dissimilar conditions it could itself haul plaintiff's cars from the mines but could not do so economically for the other mine operators. The Supreme Court held that whether or not the allowance was proper was an administrative question for this commission to
108 pass upon, and that hence the action did not lie, and on page 255 of its opinion said:

"But these claims of the parties emphasize the fact that there are two classes of acts which may form the basis of a suit for damages. In one the legal quality of the practice complained of may not be definitely fixed by the statute so that an allowance, otherwise permissible, is lawful or unlawful, according as it is reasonable or unreasonable. But to determine that question involves a consideration and comparison of many and various facts and calls for the exercise of the discretion of the rate-regulating tribunal. The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been paid. If the decision of such questions was committed to different courts with different juries the results would not only vary in degree, but might often be opposite in character, to the destruction of the uniformity in rate and practice, which was the cardinal object of the statute."

On pages 256 and 257:

"It is argued that this conclusion ignores sections 9 and 22, which give the shipper the option of suing in the courts or applying to the commission. The same argument was made and answered in the Abilene case by showing that to permit suits based on the charge that a particular practice was unreasonable, without previous action by the commission, would repeal the many provisions of the statute

requiring uniformity and equality. For, manifestly, such uniformity and equality can not be secured by separate suits before separate tribunals involving the reasonableness of a rate or practice. The evidence might vary, and, of course, the verdicts would vary, with the result that one shipper would succeed before one jury and another fail before a different jury, where the reasonableness of the same practice was involved. Manifestly, different verdicts would occasion inequality between the two shippers, and it is equally manifest that if the commission had made one order of which both could avail themselves there would have been one finding, of which one, two, or a score of shippers could equally avail themselves. The claim that this conclusion nullifies section 9 is concretely answered by the fact that the court has just decided to the contrary in Pennsylvania R. R. v. International Coal Co. There the carrier insisted that a suit for damages, occasioned by rebating, could not be maintained without preliminary action by the commission. This contention was overruled, and it was held that, for doing an act prohibited by the statute, the injured party might sue the carrier without previous action by the commission, because the courts could apply the law prohibiting a departure from the tariff to the facts of the case. But where the suit is based upon reasonable charges or unreasonable practices there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the commission and not the courts should pass upon that administrative question. When such order is made it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case—thereby giving every shipper equal rights and preserving uniformity of practice. Section 9 gives the plaintiff the option of going before the commission or the courts for damages occasioned by a violation of the statute. But since the commission is charged with the duty of determining whether the practice was so unreasonable as to be a
109 violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the commission that the practice or the rate was thus unreasonable and therefore illegal and prohibited."

On pages 258, 259, and 260:

"In considering the administrative questions as to reasonableness, the elements of the problem are the same, whether they involve the validity of obsolete allowances, discarded tariffs, or current rates and practices. In both classes of cases there is a call for the exercise of the rate-regulating discretion and the same necessity for having the matter settled by a single tribunal. * * *

"As to past and present practices for allowances, the commission has the same power and there is the same necessity to take preliminary action. This was recognized in Texas, &c., Ry. v. Abilene Co., 204 U. S., 426, where, after considering sections 8 and 22, relating to jurisdiction and the statutory and common law remedy, it was

said that although a railroad might alter its rates voluntarily or in obedience to an order of the commission, yet it can "not be doubted that the power of the commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force."

In Morrisdale Coal Co. v. P. R. R. Co., 230 U. S., 304, the matter complained of as undue discrimination was a long-abandoned method of coal car distribution which operated to the alleged injury of the complaining coal company. Here, too, the courts held that a prior finding by the commission that the practice was unreasonable was essential to the cause of action. On page 313 of the opinion the court said:

"* * * the question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the commission. It was distinctly so ruled in the Pitcairn case, 215 U. S., 481, and in I. C. C. v. Illinois Central, 215 U. S., 452. Those cases involve a consideration of the power of the commission over the distribution of cars and held that the courts could not by mandamus compel it to make a rule, nor by injunction restrain the enforcement of one it had promulgated. If in those direct proceedings the courts could not pass upon the question of reasonableness of a method of allotting cars, neither can it do so as an incident to an action for damages.

"In view of the decision in the Abilene, Pitcairn, and Robinson cases, it is unnecessary again to discuss the statute or do more than say that in this case the plaintiff was not entitled to maintain its action without producing an order of the commission that the rule adopted by the Pennsylvania Railroad was unreasonable."

Because of the importance of the subject, we have quoted at length the statements of the Supreme Court of the United States on the question of priority of jurisdiction as between the commission and the courts. We will now consider their bearing upon defendant's contentions. A careful examination of the language used by the Supreme Court shows that it has nowhere declared that there
110 can be no concurrent jurisdiction of the commission and the courts. True, it has stated that section 9 must be read in the light of the remainder of the act and can not be so interpreted as to defeat the purposes of the act. For that reason it was held that certain questions may not be brought before the courts for adjudication without a prior determination by this commission. The fallacy of defendant's reasoning becomes evident when we consider the reasons assigned by the court for not assuming original jurisdiction of administrative questions. In the Abilene case the court said that an interpretation of the act which would allow a shipper to obtain relief upon the basis that the established rate was unreasonable in the opinion of a court and jury would "destroy the prohibition against preference and discrimination"; and would make it

impossible to maintain "a uniform standard of rates." In other words, an opposite holding would have accomplished the very thing which the act to regulate commerce was intended to prevent. Can it be argued that if the commission assumed jurisdiction in the present case the accomplishment of the objects and purposes of the act would be endangered? It is obvious that such a contention can not be made. In the Mitchell case it is definitely stated that "section 9 gives the plaintiff the option of going before the commission or the courts for damages occasioned by a violation of the statute." The only exception made in any instance is that necessitated by the prior adjudication by the commission of an administrative question.

Furthermore, one can not escape the conclusion that the question as to the extent to which defendant failed to comply with the duty it owed complainants to furnish cars upon reasonable request therefor is an administrative one of which the commission alone can take original jurisdiction. This must be true unless it be the carrier's absolute duty to furnish cars at all times to the full extent of the shipper's demands. Only then would this complaint present a question like that considered in P. R. R. Co. v. International Coal Co., supra. It may be that after the determination by the commission of the number of cars which the defendant should have furnished and of the times when it should have furnished them the courts would have concurrent jurisdiction with the commission of the ascertainment of the damages suffered by complainants by reason of defendant's failure to perform that duty. However, it is not a carrier's duty to furnish all cars demanded at all times. In substance section 1 provides that upon reasonable request it shall be the duty of every carrier to furnish cars. By virtue of these requirements it becomes the carrier's duty to maintain a reasonably adequate car supply, and the question of what is a reasonably adequate car supply is just as much an administrative one as the question of
111 what is a reasonable rate. The legal sufficiency of defendant's car supply can not be definitely fixed by the statute. It is a question which, using the language of the court in the Mitchell case, "involves a consideration and comparison of many and various facts and calls for the exercise of the discretion of" this tribunal.

It does not necessarily follow, however, that every case involving car supply must come first before this commission. It is obvious that if a carrier should absolutely refuse to furnish a shipper cars under any circumstances, that would be a violation requiring no administrative determination, and the courts could take primary jurisdiction. It would be analogous to the situation presented in P. R. R. Co. v. International Coal Co., supra, or Danciger v. Wells, Fargo & Co., supra., and L. & N. R. R. Co. v. Cook Brg. Co., supra, to which defendant referred in its argument. In the latter case it was held to be unnecessary under the rule in the Abilene case for a shipper, who had been refused transportation of liquor into dry territory because of the alleged prohibition of a State statute, to go to the commission before suing for a mandatory injunction to compel such service.

A large number of the cases now before the courts involving the adequacy of carriers' car supply, and which defendant contends must be held to be improperly before the courts should the commission have jurisdiction in the present case, are undoubtedly cases of the sort referred to in the preceding paragraph. So, also, cases involving the adequacy of car supply for intrastate shipments are obviously within the jurisdiction of State tribunals.

The distinction between a case involving car supply of which this commission has primary jurisdiction and a case which may be brought before the courts without a prior determination by the commission is clearly stated in United States v. L. & N. R. R. Co., 195 Fed., 88. In that case the United States Commerce Court was petitioned for a writ of mandamus commanding defendants to transport coal over the through routes and at the joint rates which had been established by them. It appears that there had been a controversy of long standing between defendants as to which carrier should furnish cars for loading at the mines of the petitioners. The court held:

"This court has no jurisdiction to consider the question of car distribution in advance of some action by the Interstate Commerce Commission or to determine how many cars the Southern Railway shall furnish or how many the Louisville & Nashville Railroad shall furnish for the transportation of the petitioners' coal. It is believed, however, that this court has the undoubted jurisdiction upon the facts presented by the record to issue a writ or writs of mandamus directed to these common carriers, commanding them that, so long as they establish and maintain through routes and joint rates to southeastern territory, they shall move and transport in
112 interstate commerce the coals of the petitioners when tendered in such reasonable quantities as may be determined either by agreement with the carriers or by the Interstate Commerce Commission if they can not agree."

Another decision of the Supreme Court of the United States which involves a question of car supply is C., R. I. & P. Ry. Co. v. Hardwick Elevator Co., 226 U. S., 426. In that case the court had under consideration the validity of a Minnesota statute which, among other things, undertook to penalize carriers in the sum of one dollar per car per day for failing to supply cars upon demand. The Supreme Court held that Congress had legislated upon the subject of furnishing cars, and that State regulations, in so far as they applied to interstate shipments, must yield to the supreme power conferred upon Congress by the commerce clause of the Federal Constitution. Upon pages 434 and 435 of the opinion, after referring to the provisions of section 1 of the act requiring carriers to furnish cars upon reasonable request therefor, the court said:

"Not only is there, then, specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the act to regulate commerce give remedies for the violation of that duty. Thus, by section 8, is it provided 'that in

case any common carrier subject to the provisions of this act * * * shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damage sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.' Further, by section 9, an election is given to either make complaint to the Interstate Commerce Commission or to bring, in a designated court, an action for the recovery of damages, and by section 10 it is made a criminal offense for an employee of a corporation carrier to 'willfully omit or fail to do any act, matter, or thing in this act required to be done.'"

Although the question was not directly involved, it should be noted that the court states definitely that upon a carrier's failure to furnish cars for interstate traffic upon reasonable request therefor, an election is given, under section 9 of the act, either to make complaint to the Interstate Commerce Commission or to bring, in a designated court, an action for the recovery of damages.

Defendant has also called attention to certain rulings of this commission in situations alleged to be analogous to the present one, which, it is alleged, are inconsistent with the assumption of jurisdiction in the present case. Some of these rulings, such as the refusal of the commission to take jurisdiction to award damages for failure to deliver telegrams or for delay in shipments, clearly involve duties imposed on the carriers by the common law, which are not referred to in the act to regulate commerce.

113 In Huerfano Coal Co. v. C. & S. E. R. R. Co., 28 I. C. C., 502, 506, the commission used the following language:

"It is the view of the commission that each carrier subject to the act is charged with the duty of furnishing cars to the industries located upon its line In the case of through routes composed of two or more carriers the obligation to furnish cars for transportation over such through routes is joint upon the carriers therein. The law of this case, therefore, is that the Colorado & Southeastern Railroad, so long as it is to be considered as a common carrier, has the duty of furnishing cars for shipments between points on its line if there are any such shipments. Its obligation to furnish cars for shipments to points upon the lines of its connections is joint with such connections, and it can not be relieved of its portion of such joint liability by any contract with such connections."

Defendant's argument that the assumption of jurisdiction in the present case would be inconsistent with the mandamus provisions of section 23 of the act is completely answered in B & O. R. R. Co. v. Pitcairn Coal Co., supra, where the court said that the remedy afforded by section 23—

"must be limited either to the performance of those duties which are so plain and so independent of previous administrative action

of the commission as not to require a prerequisite exertion of power by that body, or to compelling the performance of duties which plainly arise from the obligatory force which the statute attaches to orders of the commission, rendered within the lawful scope of its authority, until such orders are set aside by the commission or enjoined by the courts."

There remains for consideration defendant's objection to the assumption of jurisdiction by the commission in the present case on the ground that it would violate the provisions of the seventh amendment to the constitution, which guarantees a trial by jury in all controversies triable at common law and involving more than $20. Under the original act of 1887 the commission had no power to award damages, since that act provided no method for allowing the defendant the jury trial to which it was entitled under the seventh amendment. The amendment of March 2, 1889, to section 16 provided for a jury trial before the Federal courts at the request of the defendant in all cases wherein the commission awarded damages, thus removing the constitutional objection to an award of damages by the commission. Further changes were made in section 16 of the act by the amendments of June 29, 1906, and June 18, 1910, eliminating much of the language added in 1889. In the act as it now stands it is provided that suits to enforce the commission's orders for reparation "shall proceed in all respects like other civil suits for damages."

In this connection we call attention to the following from
114 Mitchell Coal & Coke Co. v. P. R. R. Co., 230 U. S., 247, 258,
where the court said with regard to orders of reparation by this commission:

"Such orders, so far as they are administrative, are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers who have been or may be affected by the rate, can take advantage of the ruling and avail themselves of the reparation order. They are quasi judicial and only prima facie correct in so far as they determine the fact and amount of damage—as to which, since it involves the payment of money and taking of property, the carrier is by section 16 of the act given its day in court and the right to a judicial hearing."

From this it becomes evident that defendant would not be deprived of its rights under the seventh amendment should this commission assume jurisdiction in the present case.

Even if it were true that the commission and the courts have concurrent jurisdiction of this case, considerations of expediency should have no weight in deciding whether or not the commission should assume jurisdiction. The question of expediency was decided by Congress and is a matter reserved for the consideration of the legislative branch of the Government, into which we can not inquire. This commission must look to the act and the amendments thereto for guidance, and we are satisfied that under its provisions as interpreted by the Supreme Court of the United States, it is our duty to determine the issues herein presented.

The jurisdictional question disposed of, we now direct attention to the complaints themselves. The periods during which it is alleged defendant failed to provide cars "upon reasonable request therefor," all of which were within two years prior to the filing of the complaints, are as follows: (1) September 1, 1911, to December 31, 1911; (2) January 1, 1912, to April 1, 1912; and (3) September 1, 1912, to April 1, 1913.

Statements filed in the record by complainants purport to show that due to the alleged car shortage they were unable to ship the following quantities of coal:

	First period.	Second period.	Third period.
	Tons.	*Tons.*	*Tons.*
Groom Coal Co	15,200	13,400	21,255
Vulcan Coal & Mining Co	34,803	21,681	56,382
St. Louis-Coulterville Coal Co	33,524	27,078	60,652

These results were attained as follows: The quantity of coal which complainants claim they could have shipped had the cars been supplied was arrived at by multiplying the basal rating of the mines, made for the purpose of car distribution, by 21, which complainants state represents a fair number of working days for each
115 month. This result, multiplied by the number of months in each period of car shortage, gave the tonnage which it is alleged could have been shipped during each period. Then was deducted the quantity shipped during the same period, and this gave the shortage claimed. Complainants also presented computations of their damages, based upon the loss of profits on the shipments, which, it is claimed, would have been made, and upon the greater cost of mining due to their restricted output. On complainants' request the general superintendent of transportation of the Illinois Central Railroad introduced in evidence a statement showing the percentage of ordered cars which were actually furnished during the car-shortage periods. The following percentages are shown for defendant's St. Louis division, on which complainants are located:

"First period: September, 1911, 98 per cent; October, 1911, 56 per cent; November, 1911, 42 per cent; December, 1911, 67 per cent.

"Second period: January, 1912, 33 per cent; February, 1912, 45 per cent; March, 1912, 39 per cent.

"Third period: September, 1912, 61 per cent; October, 1912, 36 per cent; November, 1912, 33 per cent; December, 1912, 47 per cent; January, 1913, 68 per cent; February, 1913, 80 per cent; March, 1913, 84 per cent."

The figures from which these percentages were compiled include the cars which defendant furnished mines from which it purchased the entire output. If only the cars furnished commercial mines were considered the percentages would be still lower.

The necessity of maintaining an adequate car supply at coal mines is referred to in Interstate Commerce Commission v. I. C. R. R. Co., 215 U. S., 452, 460:

"It is conceded in argument that bituminous coal mines, which are the character of mines here involved, must dispose of their product as soon as the coal is delivered at the surface, as it is not practicable for an operator to store such coal, and the amount that a mine will produce is therefore directly dependent upon the quantity that can be taken away day by day. As a result of this situation, it is also conceded that railroads upon whose lines coal mines are situated pursue a system by which daily deliveries of cars, based upon requisitions of the respective mines, are made to such mines to permit of the removal of their available output for that day."

The period of greatest demand for coal cars is usually during the winter, when the operators can as a rule dispose of all the coal they are able to produce. Complainants contend that while carriers are not bound to provide in advance for extraordinary occasions or an unusual influx of freight, nor to furnish equipment to take care of a rush demand such as may occur in any given locality only temporarily and at long intervals, they should be required to provide equipment and facilities sufficient for the prompt handling of the average normal tonnage produced under normal conditions during each
116 recurring special season. It is stated that the failure to furnish cars has been an annually recurring event on defendant's line.

Defendant severely criticises the basis upon which complainants seek to recover damages. The testimony would seem to show that on certain days included within the periods of car shortage set forth complainants were unable to furnish billing for coal which had been loaded into cars, and that at other times, due to breakdowns, the mines were not running. It is contended that complainants' allegations that they could have shipped as much coal as is represented by the rating of their respective mines is not supported by sufficient proof. However, the question of whether or not the complainants' method of arriving at the extent of the car shortage is proper has to do with the question of the amount of the damages, which was reserved for a subsequent hearing. The other matters referred to above deal with the same question. For the present it will suffice to note that complainants did not receive all the cars which they deemed necessary for the successful operation of their mines.

Defendant, however, further contends that its car supply during the periods set forth was legally sufficient. Attention is called to additional purchases of coal cars and engines and of extensions of terminal facilities which have been made since 1911. It is submitted that defendant has made every reasonable effort to meet the increasing demand for equipment. The average number of coal cars per mile of track on defendant's railroad was given as 3.6 cars per mile in 1911, 3.9 cars per mile in 1913, and 4.3 cars per mile on January 1, 1914. A comparison made by defendant of its car supply per mile of track with the supply of other carriers in the same vicinity tends to

show that the Illinois Central has provided itself with equipment in excess of that of the other lines. As an explanation for whatever car shortage may be found to have existed during the periods specified, it is stated that the problem of distributing coal cars among a large number of mines of small capacity, such as those on defendant's line, is much more complicated and difficult than the problem of distributing the same amount of equipment among a small number of mines of relatively large capacity. It is further stated that the fact that much of the coal produced by mines on the Illinois Central goes to points beyond defendant's line adds to the difficulty of maintaining an adequate car supply. Finally, attention is called to the severe weather which prevailed during the winter of 1911–1912, and to a strike of the shop force and a large number of clerks on defendant's line, which, defendant claims, prevented it from supplying all the cars needed at all times.

As has already been said, a carrier can not be expected to maintain a car supply which will meet all demands of the coal
117 operators at all seasons and under all conditions. Upon this point it was said In re Irregularities in Mine Ratings, 25 I. C. C., 286, 293:

"If the carriers were to equip themselves with cars, motive power, tracks, and terminals so as to meet at any moment the maximum demand for transportation, the shipping public would be obliged to pay interest upon that investment and for the maintenance of those facilities."

However, although a full car supply can not be expected all the time, carriers must do more than to provide themselves with sufficient equipment for the slack period of coal production.

Another rule which has been recognized in the courts is that a carrier must assume the burden of explaining or excusing its failure to furnish cars. While the testimony offered by defendant explains to some extent its failure to furnish cars during the periods specified, it does not in our opinion present a complete excuse. It may safely be said that at least in so far as the car supply upon the St. Louis division is concerned defendant did not at all times meet the requirements of the act. The figures submitted by defendant's general superintendent of transportation show that during certain months of the car-shortage periods the car supply on the St. Louis division was as low as 33 per cent of the cars demanded. However, from this it does not follow that complainants were damaged by the carrier. Even though the car supply for the entire division upon which their mines are located was inadequate, the supply at their particular mines might have been adequate to meet all reasonable demands which they were in a position to make.

At the hearing complainants and defendant agreed not to go into the matter of the amount of damages to be recovered. The question of whether or not the car supply was legally adequate at these particular mines is so closely bound up with the question of the amount of damages that we have decided to leave both questions for a subsequent hearing.

CLARK, Commissioner, dissenting:

The commission is vested with broad powers and wide discretion. In part its duties are quasi judicial, but it is primarily and essentially an administrative body, exercising powers which are legislative in their nature and which are delegated to it by the Congress and are limited by the terms of the delegation. It is clearly our duty to observe and enforce the substantive and definite provisions of the act, with due consideration for the letter and the spirit of the law. The operation of the railroads is inseparably bound up with the commerce of the country. The demands upon the railroads are varied in their nature, and they vary greatly with changing conditions. It is therefore necessary, while observing the letter and
118 the spirit of the law, to construe and administer it in workable ways and so that commerce and transportation will be promoted and not retarded.

In so far as Federal legislation and regulation go, the carriers have so far been left to exercise their own judgment in the construction of roads and the equipment thereof. The roads are built and operated by private owners and for financial profit. It is therefore presumed that a carrier will, in so far as it is able to do so, provide itself with such facilities as will on the whole permit it to serve its patrons and earn the largest possible revenue, with proper consideration for judicious investment and proper economies.

The railroads are permitted to provide equipment by purchase, lease, or rental. In Interstate Commerce Commission v. I. C. R. R. Co., 215 U. S., 452, it was held that a railroad's car supply may be legally sufficient, and yet not sufficient to meet the demands of shippers in unforeseen contingencies, fluctuations in the demand for transportation, or unavoidable absence of equipment off the line.

As was stated in Investigation of Alleged Irregularities in Mine Ratings by the I. C. R. R. Co., 25 I. C. C., 286, 293:

"If the carriers were to equip themselves with cars, motive power, tracks, and terminals so as to meet at any moment the maximum demand for transportation, the shipping public would be obliged to pay interest upon that investment and for the maintenance of those facilities."

The demand for cars varies in different parts of the year and as between different years, dependent upon general conditions of business, more or less bountiful crops, and climatic conditions. In a moderate winter we hear no complaints of shortage of cars for the transportation of coal, while in a severe winter such complaints are heard from all coal-producing sections. When there is a heavy crop of grain and a good market therefor there is a correspondingly heavy demand for cars for movement of grain, but under different conditions as to crop and market the demand for cars is correspondingly different. The same is true of the cotton crop. In 1907, a time of tremendous business activity, there was a general shortage of cars and terminal facilities, but that condition did not last, and

since then there has been, as the reports show, a general surplus of idle cars.

The commission has never exercised, and has never been understood to possess, the power to require a carrier to enlarge its facilities or service or to award damages against a carrier for failure so to do. Certain properties, such as tracks, bridges, ferries, etc., are specified in the act as included in the term "railroad," but the act contains no suggestion that the commission is empowered to require a carrier to provide additional tracks, bridges, or ferries. The
119 act declares it to be the duty of every carrier subject to its provisions to provide and furnish transportation upon reasonable request therefor, and defines the term "transportation" as including "all instrumentalities and facilities of shipment or carriage," including cars and other vehicles and all services in connection with the receipt, delivery, elevation, storage, etc., of property transported. If, therefore, the commission has power to require a carrier to provide itself with additional cars, or suffers awards of damages for failure so to do, it would follow that the commission has the same power to require a carrier to provide itself with an elevator, warehouse, or additional tracks, or to run additional trains, or be subject to awards of damages for failure so to do.

The prime purposes of the law are to insure the public against unreasonable charges and secure service for the public that is free from unjust discrimination and undue prejudice. The railroad, including the parts thereof which are enumerated as embraced in the term "railroad," and the facilities specified as included in the term "transportation," is subject to the provisions of the act. This sets at rest all question as to whether or not those parts and facilities are subject to the regulatory power, and removes all doubt as to the right to use them, or any of them, in such way as to create or continue unjust discrimination or undue prejudice. All railroads existing and engaged in interstate transportation at the time the law became effective, and all subsequently constructed railroads similarly engaged, were brought within the terms and provisions of the act, but no obligation was laid upon any such railroad to extend its lines or enlarge the field of transportation in which it was engaged.

The act requires a carrier subject to its provisions, upon proper application, to construct, maintain, and operate on reasonable terms switch connections with lateral branch lines of railroad or private sidetracks, and to "furnish cars for the movement of such traffic to the best of its ability." This language seems to recognize the fact that the carrier may not, and probably will not, be able at all times to furnish desired cars, but it must furnish them "to the best of its ability" and without discrimination between shippers.

Section 7 of the act prohibits carriers from preventing the carriage of freight from being continuous from the place of shipment to the place of destination by carriage in different cars, break of bulk, stoppage, or interruption, which is not made in good faith for some necessary purpose.

Section 8 of the act provides that if a carrier shall do anything prohibited, or omit to do anything required of it, by the act, it shall be liable to the person injured for damages sustained in conse-
120 quence thereof, together with reasonable counsel or attorney's fee, "to be fixed by the court in every case of recovery."

In section 20 of the act it is provided that the courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States, at the request of the commission alleging a failure to comply with, or violation of, any of the provisions of the act, to issue writs of mandamus commanding such carriers to comply with any provision of the act.

Section 23 of the act specifically confers upon the Federal courts jurisdiction, upon the relation of any person, firm, or corporation alleging such violation by a carrier of any provision of the act as prevents the relator from having interstate traffic moved at the same rates charged, or on as favorable conditions as those given to, any other shipper, to issue a mandamus commanding a carrier "to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ." Such mandamus may issue notwithstanding any question of fact as to proper compensation to the carrier is undetermined, upon such terms as to security for payment as to the court may seem proper.

Under the well-known conditions of transportation by railroad, and responsive to the plain intent of the law as expressed by the prohibition hereinbefore referred to against interruption to through shipments, and the requirement that carriers shall establish and maintain through routes and joint rates, it is essential that cars shall be freely interchanged between carriers. The varying conditions in different sections of the country at different seasons of the year and in different years render it, I believe, impracticable and impossible for the carrier which receives from a connection a loaded car to always deliver in return therefor an empty car. In addition to this there are multitudes of instances in which, and many times and seasons of the year when, such exchange of an empty for a load is neither desired nor desirable. The empty car may not be needed there, but may be badly needed at some other point or by some other connecting road.

A carrier being required to be a party to through routes and joint rates and to facilitate the movement of shipments without carriage in different cars or breaking of bulk, it follows that it must permit its cars to go to such destination as are selected by the shipper. It can have no accurate knowledge of what those destinations will be. The shipper will naturally select the market which is most advantageous to him. He may, therefore, ship in one direction at one time and in another direction at another time. If the carrier must respond in damages because of its inability to furnish cars at a time of unusual demand for cars, it seems to me that the right of
121 that carrier to confine its equipment to its own rails must be recognized; but that right was specifically denied to the re-

spondent in the instant case in Missouri & Illinois Coal Co. v. I. C. R. R. Co., 22 I. C. C., 39.

In the original act, as well as in amendments thereto which have broadened, extended, and strengthened the commission's jurisdiction and powers, the Congress has carefully refrained from transferring to, or conferring upon, the commission any jurisdiction or power which properly belongs to the judicial branch of the Government.

For all of these reasons, together with the fact that the commission's orders for the payment of money are only prima facie evidence in the courts, in connection with which the court may receive additional testimony which has not been presented to the commission, I think that the question of requiring a carrier to provide itself with additional facilities or respond in damages for failure so to do is essentially a judicial question jurisdiction of which reposes in the courts, which have authority to create and direct the conduct of receiverships, and not in the commission, which has been created to exercise certain delegated powers legislative in character. I am, therefore, unable to agree with the majority report.

I am authorized by CHAIRMAN HARLAN and COMMISSIONER CLEMENTS to say that they concur in these views.

By the commission.

[SEAL.] GEORGE B. MCGINTY,
Secretary.

Endorsements as follows:

122 In Equity, No. 1065. In the District Court of the United States for the Eastern District of Illinois. Illinois Central Railroad Company, petitioner, v. The United States of America, respondent. Motion to dismiss and answer of the Interstate Commerce Commission. Joseph W. Folk, Edward W. Hines, Counsel for Interstate Commission. Filed Sept. 28, 1915, C. P. Hitch, Clerk.

123 And on the same day—to wit, on the 28th day of September, A. D. 1915—there was entered in said court in said cause the final decree, which said final decree was and is in the words and figures following, to wit:

124 In the District Court of the United States for the Eastern District of Illinois.

Tuesday, September 28, A. D. 1915. Present: Hon. Francis E. Baker, United States Circuit Judge, Seventh Judicial Circuit; Hon. J. Otis Humphrey, United States district judge, Southern District of Illinois; and Hon. Francis M. Wright, United States district judge, Eastern District of Illinois.

ILLINOIS CENTRAL RAILROAD COMPANY, petitioner, v. THE UNITED STATES OF AMERICA, respondent, and Interstate Commerce Commission, intervening respondent.	In Equity. No. 1065.

Final decree.

This cause came on for hearing on the application of the petitioner for preliminary injunction and the motion of the United States and the Interstate Commerce Commission to dismiss the petition, and the answer of the Interstate Commerce Commission.

Prior to the submission the Interstate Commerce Commission, by leave of court, withdrew the denial in paragraph 2 of its answer of the allegations of paragraph 9 of the petition.

125 On consideration whereof it is ordered, adjudged, and decreed as follows:

1. That the motion of the United States to dismiss the petition be, and the same is hereby, denied.

2. That the motion of the Interstate Commerce Commission to dismiss the petition be, and the same is hereby, denied.

3. That the motion of the petitioner for a preliminary injunction be, and the same is hereby, granted, and that a preliminary injunction be, and the same is hereby, issued, restraining and enjoining the Interstate Commerce Commission from further proceeding with the hearings on the three complaints before it referred to in the petition, and that all other and further proceedings on the said complaints before the Interstate Commerce Commission be, and the same are hereby, stayed.

To which rulings the respondents, and each of them, severally object and except. And thereupon the said respondents, and each of them, in open court elected to plead no further and to stand upon their said motions and answer, and thereupon the parties to the cause submitted the same on final hearing for final decree.

126 Upon consideration whereof it is further ordered, adjudged, and decreed as follows:

1. That the complaints filed before the Interstate Commerce Commission in the three proceedings referred to in the petition are beyond the jurisdiction of the Interstate Commerce Commission to hear and determine.

2. That the preliminary injunction hereinabove ordered to be issued be, and the same is hereby, made permanent and perpetual.

3. That the order of the Interstate Commerce Commission fixing the hearing on the said three complaints and the notice thereof referred to in the petition be, and the same are hereby, cancelled, and the said Interstate Commerce Commission, its members, officers, agents, attorneys, and employees be, and the same are hereby, per-

manently enjoined from further proceeding with the hearing of the said complaints, or any of them.

To which rulings the respondents, and each of them, severally object and except.

127 And afterwards—to wit, on the 23d day of November, A. D. 1915—there was filed in the office of the clerk of said court in said cause a petition for appeal to the Supreme Court of the United States, which said petition for appeal was and is in the words and figures following, to wit:

128 In the District Court of the United States for the Eastern District of Illinois.

ILLINOIS CENTRAL RAILROAD COMPANY, petitioner, v. UNITED STATES OF AMERICA, respondent, and Interstate Commerce Commission, intervening respondent.	In Equity. No. 1065.

Petition for appeal.

United States of America, respondent, and Interstate Commerce Commission, intervening respondent, feeling themselves aggrieved by the final order or decree of the District Court entered September 28, 1915, pray an appeal to the Supreme Court of the United States from the said final order or decree.

The particulars wherein United States of America and Interstate Commerce Commission consider said final order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

129 And the United States of America and the Interstate Commerce Commission pray that a transcript of the record, proceedings, and papers on which the said final order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

CHARLES A. KARCH,
United States Attorney Eastern District of Illinois.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
JOS. W. FOLK,
Solicitor for the Interstate Commerce Commission.

Allowed:
FRANCIS M. WRIGHT,
United States District Judge, Eastern District of Illinois.

Endorsed: Filed Nov. 23, 1915. C. P. Hitch, clerk.

130 And on the same day—to wit, the 23d day of November, A. D. 1915—there was filed in the office of the clerk of said court in said cause an assignment of errors, which said assignment of errors was and is in the words and figures following, to wit:

131 In the District Court of the United States for the Eastern District of Illinois.

ILLINOIS CENTRAL RAILROAD COMPANY, petitioner. v. UNITED STATES OF AMERICA, respondent, and Interstate Commerce Commission, intervening respondent.	In Equity. No. 1065.

Assignment of errors.

United States of America, respondent, and Interstate Commerce Commission, intervening respondent, now come, by their respective counsel, and in connection with their petition for appeal file the following assignment of errors on which they will rely on said appeal to the Supreme Court of the United States from the final order of decree of the District Court entered against them September 28, 1915, in the above entitled cause.

The District Court erred:

I. In overruling the motion of the United States to dismiss the petition for want of jurisdiction in the court to hear and determine the said cause and in not sustaining the said motion.

132 II. In taking jurisdiction of the petition and proceeding to hear and determine the said cause and entering a decree therein other than a decree dismissing the petition for want of jurisdiction.

III. In overruling the motion of the Interstate Commerce Commission to dismiss the petition upon the various grounds set forth in the said motion and in not sustaining the said motion.

IV. In not sustaining the motion of the United States (after overruling its motion to dismiss the petition for want of jurisdiction) to dismiss the petition for that the same is without equity on its face and does not state any cause of action against the United States and in overruling the said motion.

V. In granting the motion of the petitioner for a preliminary injunction, and in issuing a preliminary injunction restraining and enjoining the Interstate Commerce Commission from further proceeding with the hearings on the three complaints before it, and is ordering that all other and further proceedings by the Interstate Commerce Commission on the said complaints be stayed.

133 VI. In holding and adjudging that the Interstate Commerce Commission was and is without power and authority to hear and determine the complaints filed before it in the three proceedings severally referred to in the petition.

VII. In ordering that the preliminary injunction issued in the said cause should be and remain permanent and perpetual.

VIII. In annulling, cancelling, and enjoining the order of the Interstate Commerce Commission fixing the hearing on the three separate complaints and the notice of such hearing referred to in the petition, and in permanently enjoining the Interstate Commerce Commission, its members, officers, agents, attorneys, and employees from further proceeding with the further hearing of the said complaints or any of them.

IX. In not denying the application for preliminary injunction and dismissing the petition for want of equity.

Wherefore, United States of America and Interstate Commerce Commission pray that the said final order or decree of the Dis-
134 trict Court, entered September 28, 1915, be reversed, annulled, and set aside, with directions that the petition be dismissed, and for such other and further order as may be appropriate.

CHARLES A. KARCH,
United States Attorney Eastern District of Illinois.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
JOS. W. FOLK,
Solicitor for Interstate Commerce Commission.

Endorsed: Filed Nov. 23, 1915. C. P. Hitch, clerk.

135 And on the same day—to wit, the 23d day of November, A. D. 1915—there was entered in said court in said cause an order allowing an appeal to the Supreme Court of the United States, which said order was and is in the words and figures following, to-wit:

136 In the District Court of the United States for the Eastern District of Illinois.

Tuesday, November 23, A. D. 1915. Present: Honorable Francis M. Wright, Judge.

ILLINOIS CENTRAL RAILROAD COMPANY, petitioner, *v.* UNITED STATES OF AMERICA, respondent, AND Interstate Commerce Commission, intervening respondent.	In Equity. No. 1065.

Order allowing appeal.

In the above-entitled cause, United States of America, respondent, and Interstate Commerce Commission, intervening respondent, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the Dis-

trict Court entered September 28, 1915, and having also made and filed an assignment of errors, and having in all respects conformed to the statutes and rules of court in such case made and provided:

137 It is ordered and decreed, that the said appeal be, and the same is hereby, allowed as prayed and made returnable within thirty days from the date hereof; and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings, and papers on which said order or decree was made and entered to the Supreme Court of the United States.

138 And on the same day—to wit, the 23d day of November A. D. 1915—there was filed in the office of the clerk of said court in said cause a præcipe for record, which said præcipe was and is in the words and figures following, to wit:

139 In the District Court of the United States for the Eastern District of Illinois.

ILLINOIS CENTRAL RAILROAD COMPANY, petitioner, *v.* UNITED STATES OF AMERICA, respondent, AND Interstate Commerce Commission, intervening respondent.	In Equity No. 1065.

Præcipe for Record.

To the Clerk: You will please prepare and certify a transcript of the entire record in the above-entitled cause to be filed in the office of the Clerk of the Supreme Court of the United States, on the appeal from the final order or decree of the district court, entered September 28, 1915, and include in said transcript all of the pleadings, exhibits, notices, appearances, motions, orders, decrees, journal entries, appeal papers, and any other papers on file or of record in said cause.

CHARLES A. KARCH,
United States Attorney, Eastern District of Illinois.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
JOS. W. FOLK,
Solicitor for Interstate Commerce Commission.

Endorsed: Filed Nov. 23, 1915, C. P. Hitch, clerk.

140 And afterwards—to wit, on the 27th day of November, A. D. 1915—there was filed in the office of the clerk of said court in said cause, notice to the attorney general of the State of Illinois of the appeal in said cause and acknowledgment of receipt of same, which said notice and acknowledgment was and is in the words and figures following, to wit:

141 In the District Court of the United States, for the Eastern District of Illinois.

ILLINOIS CENTRAL RAILROAD COMPANY, petitioner,
v.
UNITED STATES OF AMERICA, respondent, AND Interstate Commerce Commission, intervening respondent.
} In Equity, No. 1065.

To the Honorable Patrick J. Lucey, Attorney General of the State of Illinois:

You are hereby notified that the above-entitled cause was this day appealed to the Supreme Court of the United States, and that the order allowing appeal is made returnable within 30 days from this date.

This notice is given you in pursuance to chapter 32, at pages 220 and 221 of the statutes of the United States of America, passed at the 1st session of the 63d Congress, 1913.

CHARLES A. KARCH,
United States Attorney, Eastern District of Illinois.

I hereby acknowledge receipt of a copy of the above notice this 26th day of November A. D. 1915.

P. J. LUCEY,
Attorney General of the State of Illinois.

Endorsed: Filed Nov. 27, 1915, Chas. P. Hitch, clerk.

142 UNITED STATES OF AMERICA,
Eastern District of Illinois, ss.

I, C. P. Hitch, clerk of the District Court of the United States for the Eastern District of Illinois, do hereby certify the foregoing to be a true, complete, and correct transcript of the files and records in said court in a certain cause lately pending, wherein the Illinois Central Railroad Company was complainant, and the United States of America and the Interstate Commerce Commission were defendants, as fully as the same now appears from the files and records in my office. And I further certify that the citation, with the endorsements thereon, is the original citation with endorsements in said cause.

Given under my hand and official seal at my office, in the city of Danville, in said district, this 3d day of December, A. D. 1915.

[SEAL.] C. P. HITCH, *Clerk.*
By JOHN L. WATTS, *Deputy.*

143 *Citation on Appeal.*

UNITED STATES OF AMERICA, ss.

To Illinois Central Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty

days from the date hereof, pursuant to an appeal duly allowed and filed in the clerk's office of the United States District Court, Eastern District of Illinois, wherein United States of America and Interstate Commerce Commission are appellants and you are appellee, to show cause, if any there be, why the final order or decree rendered against said appellants in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Francis M. Wright, United States District Judge, Eastern District of Illinois, this 23d day of November, 1915.

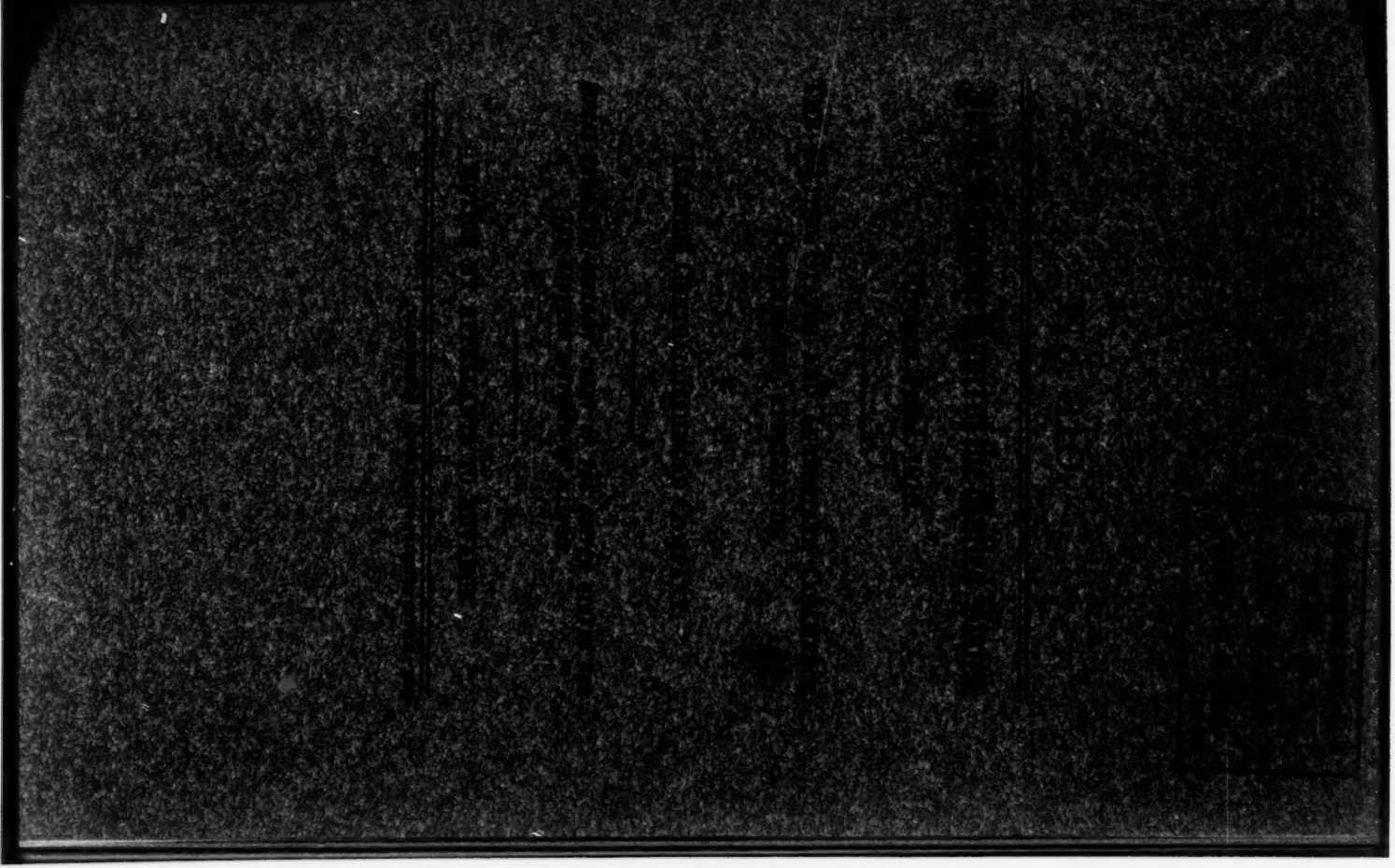
[SEAL.]

FRANCIS M. WRIGHT,
United States District Judge,
Eastern District of Illinois.

Service of a copy of the within citation is hereby admitted this 27th day of November, 1915.

R. V. FLETCHER,
Solicitor for Illinois Central Railroad Company.

(Indorsement on cover:) File No. 25,029. E. Illinois. D. C. U. S. Term No. 310. The United States and Interstate Commerce Commission, appellants, vs. Illinois Central Railroad Company. Filed December 8th, 1915. File No. 25,029.



In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION, appellants, v. ILLINOIS CENTRAL RAILROAD COMPANY.	No. 310.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ILLINOIS.

MOTION BY APPELLANTS TO ADVANCE.

Comes now the Solicitor General, and in accordance with the provisions of section 2 of the act of June 8, 1910, 36 Stat. 539, 542, and the urgent deficiency act of October 22, 1913, 38 Stat. 208, 220, moves the court to advance the above-entitled cause for hearing on a day convenient to the court.

This is an appeal from a final decree entered by the District Court of the United States for the Eastern District of Illinois perpetually enjoining and restraining the Interstate Commerce Commission from proceeding with a hearing before that

69913—16

body inquiring into the amount of reparation alleged to be due three certain coal companies, with mines located on the line of the Illinois Central Railroad Company, which companies had filed a petition before the commission claiming damages for loss occasioned by the failure of said railroad company to furnish an adequate supply of cars to handle the interstate traffic originating at the mines of said coal companies as required by the act to regulate commerce.

The case involves the questions, *inter alia:*

1. Whether the Interstate Commerce Commission has jurisdiction to entertain a complaint for damages arising from the failure of a railroad carrier subject to the provisions of the act to regulate commerce to furnish an adequate supply of cars to handle the interstate traffic originating at the mines of coal companies located along its lines.

2. Whether the district courts of the United States have the power to enjoin the Interstate Commerce Commission, prior to the conclusion of a hearing into the amount of such damages and before the entering of any final order by the commission, from proceeding with a hearing into the amount of reparation due said coal companies by reason of said failure to furnish the necessary cars.

The questions are of importance not only to the shipping public generally, but also to the Interstate Commerce Commission in the administration of the act to regulate commerce, and for that reason an

early determination thereof by this court is desirable.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

NOVEMBER, 1916.

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VULCAN COAL CASE—NO. 310.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

ILLINOIS CENTRAL RAILROAD COMPANY, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ILLINOIS.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

JOSEPH W. FOLK,
Counsel for the Interstate Commerce Commission.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1917

SYNOPSIS AND INDEX.

ARGUMENT—Continued.

The Commission was charged by the act with the duty of holding the hearing, the notice of which was enjoined by the district court. The matters with respect to which that hearing was to have been held were fully and clearly within the jurisdiction of the Commission. The notice of hearing was not an "order" subject to injunction by any court; and a proceeding to enjoin the Commission from acting in the premises, if lawfully to be entertained by any court, was cognizable exclusively by the Supreme Court of the District of Columbia. The decree of the district court accordingly should be reversed, and the case should be remanded with directions that the appellee's petition for injunction be dismissed for want of jurisdiction.

TABLE OF CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, appellants,
v.
ILLINOIS CENTRAL RAILROAD COMPANY, appellee.
} No. 310.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ILLINOIS.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

STATEMENT OF THE CASE.

Appellants seek by this proceeding to reverse a decree of the District Court of the United States for the Eastern District of Illinois, enjoining and setting aside a *notice of hearing* issued by the Interstate Commerce Commission in a case pending before it. The facts in connection with which the notice was issued were as follows:

In September, 1913, the Vulcan Coal & Mining Company, the St. Louis-Coulterville Coal Company, and the Groom Coal Company, Illinois corporations having their legal domiciles at Belleville, Illinois,

filed with the Commission separate complaints against the Illinois Central Railroad Company, hereinafter called the appellee. Record, p. 2.

Each of the petitioners asked for reparation for the failure of the appellee to furnish (1) the full number of coal cars which it had requested, and (2) the proportion of the available car supply to which it had been entitled. The petitions were substantially identical in form and were treated by the Commission as constituting a single case, being designated as Docket No. 6128, Sub-Nos. 1 and 2. Record, p. 2.

At the hearing before the Commission it was stipulated by counsel that the petitions should be considered as so amended as to omit all charges of undue and unlawful discrimination, and the case was accordingly submitted on a single issue of damages based upon the alleged *failure of the appellee to furnish cars upon demand*. Record, p. 3.

In a preliminary report made January 30, 1915, *Vulcan Coal & Mining Co.* v. *Illinois Central R. Co.*, 33 I. C. C. 52, the Commission held that the appellee was required by section 1 of the act to regulate commerce to "maintain a reasonably adequate car supply," and that "the question of what is a reasonably adequate car supply is just as much an administrative one as the question of what is a reasonable rate." Record, p. 65.

It was further found upon the evidence then before the Commission that the appellee had not at all times met the requirements of the statute, at least with respect to the car supply on its St. Louis division, on

the lines of which were located the mines of the several complainants, and, in conclusion, it was said, Record, p. 71:

> However, from this it does not follow that complainants were damaged by the carrier. Even though the car supply for the entire division upon which their mines are located was inadequate, the supply at their particular mines might have been adequate to meet all reasonable demands which they were in a position to make.
>
> At the hearing complainants and defendant agreed not to go into the matter of the amount of damages to be recovered The question of whether or not the car supply was legally adequate at these particular mines is so closely bound up with the question of the amount of damages that we have decided to leave both questions for a subsequent hearing.

After the promulgation of the Commission's report, the appellee filed a petition for rehearing on the ground that the Commission had erred in assuming jurisdiction of the case. This petition, however, was denied by the Commission on July 9, 1915.

Thereafter, on August 18, 1915, the Commission, in the furtherance of the purpose set forth in the concluding paragraph of its opinion of January 30, 1915, assigned the case for a further hearing on the question of reparation, the notice of hearing being in words and figures as follows, Record, p. 4:

> No. 6128—*Vulcan Coal & Mining Co.* v. *Illinois Central Railroad Co.*; No. 6128—Sub-No. 1. *St. Louis-Coulterville Coal Co.* v.

Illinois Central Railroad Co.; No. 6128—Sub-No. 2. *Groom Coal Co.* v. *Illinois Central Railroad Co.*

The above-entitled cases are assigned for hearing October 1, 1915, 10 o'clock a. m., at Hotel Jefferson, St. Louis, Mo., before Examiner Wilson.

By the Commission.

[Signed] GEORGE B. MCGINTY,
Secretary.

The appellee thereupon filed a petition in the District Court of the United States for the Eastern District of Illinois to annul, set aside, and cancel the *notice of hearing*, and to enjoin and restrain the Commission from "proceeding further in the premises, or taking any further steps whatever toward assessing damages" against the appellee. Record, p. 5.

The United States was cited in the petition as the sole respondent, but the Commission intervened and moved to dismiss the petition, Record, p. 49, on the grounds, *inter alia*—

1. That the writing described in the petition as an "order" was merely a *notice of hearing* and not an *order* within the meaning of the term as used in the act to regulate commerce and in the act of October 22, 1913, abolishing the Commerce Court and fixing the venue of and procedure in suits to set aside orders of the Commission; and,

2. That the principal office of the Commission is in the city of Washington, and that injunction proceedings to restrain the Commission from proceeding in the cause, if

brought at all, should have been instituted in the District of Columbia and not in the Eastern Judicial District of Illinois.

A similar motion was submitted by the United States, and upon these motions, together with the answer of the Commission and a motion of the appellee for a preliminary injunction, the case was argued and submitted before Circuit Judge Baker and District Judges Humphrey and Wright, sitting as the District Court of the United States for the Eastern District of Illinois.

The motion of the appellee for a preliminary injunction was granted, and both motions to dismiss the petition were denied; whereupon, the United States and the Commission having elected to plead no further, and the case having been submitted for a final decree, it was ordered, adjudged, and decreed that the complaints filed by the several coal companies were beyond the jurisdiction of the Commission; that the preliminary injunction be made perpetual; that the notice of hearing issued by the Commission be canceled; and that the Commission be permanently enjoined from further proceeding with the hearing of the said complaints or of any of them. From that decree the Commission and the United States appealed.

QUESTIONS INVOLVED.

1. Was the *notice of hearing* issued by the Commission an *order* subject to injunction by the district court?

2. Was the district court empowered to enjoin the proceedings of the Commission?

3. Were the complaints before the Commission subject to its jurisdiction?

ARGUMENT.

I.

THE WRITING ENJOINED BY THE DISTRICT COURT WAS MERELY A NOTICE OF HEARING AND NOT AN ORDER LAWFULLY COGNIZABLE BY ANY COURT.

A. The only orders of the Commission subject to injunction are those by which is imposed a legal obligation to do or to refrain from doing a particular thing.

1. *Source and limitation of judicial power over orders of Commission.* The act creating the Commerce Court invested it with jurisdiction over "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." 36 Stat. L. 1148. The district court jurisdiction act of October 22, 1913, 38 Stat. L. 219–220, abolishing the Commerce Court and transferring its jurisdiction to the district courts of the United States, provided that:

> The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this act shall be the same as that heretofore prevailing in the Commerce Court.

It is therefore apparent that the district courts have no jurisdiction with respect to an order of the Commission which might not lawfully have been exercised by the Commerce Court before its abolition.

It is further apparent that the definition of the term *order*, as used by this court in cases under the Commerce Court Act, is likewise determinative of the scope and meaning of the word as used in the act defining the jurisdiction of the district courts.

In *Procter & Gamble* v. *United States*, 225 U. S. 282, it was held that an order of the Commission dismissing a complaint was not such an order as was contemplated by the act conferring jurisdiction upon the Commerce Court to set aside "any order of the Interstate Commerce Commission." Referring to the words last quoted it was said, pp. 293–294:

> Giving to these words their natural significance we think it follows that they confer jurisdiction only to entertain complaints as to affirmative orders of the Commission; that is, they give the court the right to take cognizance when properly made of complaints concerning the legality of orders, rendered by the Commission, and confer power to relieve parties in whole or in part from the duty of obedience to orders which are found to be illegal. * * * Thus, the first subdivision provides for the enforcement of orders; that is, the compelling of the doing or abstaining from doing of acts embraced by a previous affirmative command of the Commission, and the second * * * provides for the contingency of a complaint made to the court by one seeking to prevent the enforcement of orders of the Commission such as are contemplated by the first paragraph. In other words, by the cooperation of the two para-

graphs, authority is given on the one hand to enforce compliance with the orders of the Commission if lawful, and, on the other hand, power is conferred to stay the enforcement of an illegal order.

If, as held in the *Procter & Gamble Case*, the Commerce Court was powerless to interfere with an order of the Commission *dismissing a complaint*, for even more obvious reasons should the district court have declined, in the instant case, to enjoin a notice of hearing issued by the Commission preliminary to determining whether or not *any order other than of dismissal* should be entered.

2. *Scope of "order" as employed in act to regulate commerce*—The scope of the word "order," as employed in the act defining the jurisdiction of the district courts, is analogous to the meaning of the word as used in the act to regulate commerce.

By section 1 of the latter act the Commission is empowered to "order" carriers *to construct switch connections*, and by section 6 this power is extended to the establishment of physical connections between the lines of rail carriers and the docks of water carriers under the Panama Canal act.

By section 15 of the act to regulate commerce the Commission is authorized to prescribe just and reasonable rates, regulations, and practices of carriers in lieu of other rates, regulations, and practices found to be unreasonable, and to order the carriers *to cease and desist from the violations so found by the Commission to exist.*

The Commission is authorized by section 16 to "make an order *directing the carrier to pay* to the complainant the sum to which he is entitled" by reason of a violation of the act, the "order" in such cases being *prima facie* evidence of the facts therein stated.

Each of the foregoing provisions contemplates an "order" requiring a carrier to do or to refrain from doing something, but clearly no such obligation is imposed upon a carrier by a *notice of hearing* such as that here under consideration.

Section 15 of the act to regulate commerce provides that "*all orders of the Commission*, except orders for the payment of money, shall take effect within * * * not less than 30 days and shall continue in force * * * not exceeding two years." In ordinary practice a notice of hearing would "take effect" on the date therein specified, and there is nothing in the statute to prevent the assignment of a case for hearing at such time, within or in excess of 30 days, as may be fixed by the Commission. It is, moreover, inconceivable that a notice of hearing should "continue in force" beyond the date of the hearing, or that such hearing should be anticipated by an interval of time even approximating two years.

Section 16 of the act imposes upon every common carrier subject to its terms the duty to observe and comply with the "orders" of the Commission "so long as the same shall remain in effect," and provides for the enforcement of such orders other than for the payment of money in event of any carrier's disobedi-

ence thereto. Manifestly Congress did not intend to devolve upon a carrier a duty to comply with a *notice of hearing* issued by the Commission, or to provide for the "enforcement" of such a notice.

Section 16 also provides that the Commission may suspend or modify its orders "upon such notice and in such manner as it shall deem proper." A notice of hearing is discretional with the Commission, and a statutory authorization to "suspend or modify" it is not to have been regarded as essential. Clearly, moreover, Congress did not intend to provide for the giving of notice by the Commission as a condition precedent to a suspension or modification of a notice of hearing.

By section 16a of the act it is provided that no application for rehearing shall stay any "order" of the Commission, but an *application for rehearing* would scarcely be submitted in a case with respect to which a *notice of hearing* had been issued. Section 16a also provides that the Commission "may reverse, change, or modify" its "orders," but the authority to conduct a hearing and to give notice thereof necessarily includes the power to rescind or modify that notice.

It is therefore submitted that the notice of hearing canceled by the district court was not an "order" within the purview of the act to regulate commerce.

3. *Notice of hearing permissive, not mandatory*—The Commission, by the notice here under consideration, merely announced its purpose, through one of its examiners, to hold a particular hearing on a par-

ticular date. The appellee was thereby *permitted* to appear and to offer evidence, but it was not *required*, and could not have been *punished for a failure*, to appear.

The power of a court "to stay the enforcement of an illegal order" is, in a sense, reciprocal to its power to enforce compliance with an order of the Commission "if lawful." *Procter & Gamble* v. *United States*, 225 U. S. 282, 293. And just as the district court would have been powerless, in the instant case, to compel the appellee to attend the hearing with respect to which the notice had been given, so also was it without lawful authority to annul that notice or to enjoin the Commission from proceeding in the premises.

B. The right of the Commission to issue the notice here under consideration was expressly recognized by the statute.

Section 13 of the act to regulate commerce, as amended, after providing for the filing of complaints with the Commission, provides further that if—

> there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of *in such manner and by such means as it shall deem proper*. [Italics ours.]

Section 14 of the act, as amended, provides:

> That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or

requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

Section 17 of the act, as amended, provides:

> That *the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.* * * * Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including *forms of notices* and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. [Italics ours.]

The notice of hearing here under consideration was merely an incident in the administration by the Commission of its statutory duties. If it should be held that such a notice is subject to injunction by the courts, it would follow that the right of the Commission in any case to investigate a complaint under the statute would be contingent upon the prior sanction of the courts, a condition clearly repugnant to the act.

C. No order which the Commission might have entered in the instant case would have been subject to injunction by the district court.

The only order which the Commission could have entered in the instant case would have been an order dismissing the petition or an order for the payment of money, neither of which would have been subject to injunction by the district court. Thus, an order of

dismissal, as held in the *Procter & Gamble Case*, would have been a negative order, such as courts are powerless to enjoin, while an order for the payment of money, as held in the case of *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412, would have constituted merely a "rule of evidence," and not such an "affirmative" order as is subject to injunction by the courts.

In this connection it is to be noted that "orders for the payment of money" are in a class distinct from other "orders" contemplated by the act. Thus, the Commission is empowered by section 13 to enforce "any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had *excepting orders for the payment of money*."

Section 15 of the act provides for the effective period and for the continuance of "all orders of the Commission, *except orders for the payment of money*."

Section 16 provides for the enforcement "by a writ of injunction or other proper process, mandatory or otherwise" of "any order of the Commission *other than for the payment of money*," and such proceedings may be instituted either by the Commission, the United States, or any party injured by a violation of the order.

Orders for the payment of money, on the other hand, are enforceable, as provided in section 16 of the act at the instance of "the complainant, or any person for whose benefit such an order was made;" and, while the Commission in a few instances has *intervened* in suits on reparation orders, neither the Com-

mission nor the United States is contemplated by the statute as a litigant in such proceedings. No penalty, moreover, is provided for the violation of an order for the payment of money. The distinction between such orders and other orders subject to the act was considered by this Court in *Baer Brothers Mercantile Co.* v. *Denver & Rio Grande R. Co.*, 233 U. S. 479, and *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412.

If the Commission had held the hearing which the district court enjoined, and thereafter had actually entered an order of reparation, that order would not have been "self-enforcing," as are all valid orders of the Commission other than for the payment of money. In other words, before the carrier could have been *compelled* to respond in damages, it would have been necessary for the beneficiary under the order to institute a proceeding thereon, as provided by section 16 of the act, and in such a proceeding the order would have constituted merely "*prima facie* evidence of the facts therein stated." As said by this Court in the *Meeker Case*, p. 430:

> This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents. Nor does it in any wise work a denial of due process of law. In principle it is not unlike the statutes in

> many of the States whereby tax deeds are made *prima facie* evidence of the regularity of all the proceedings upon which their validity depends.

The reasons for denying the jurisdiction of a court to enjoin a notice of hearing issued by the Commission are conclusive in a case in which no order subject to injunction could be entered by the Commission as a result of its investigation. Inasmuch, therefore, as the district court would have been powerless to enjoin any order which the Commission might have entered in pursuance of the notice here under consideration, it was clearly beyond the jurisdiction of that court to set aside that notice or to enjoin the Commission from taking any action preliminary to determining whether an order of reparation or merely an order of dismissal should be entered.

II.

THE DISTRICT COURT WAS WITHOUT LAWFUL AUTHORITY TO ENJOIN THE PROCEEDINGS OF THE COMMISSION.

As hereinabove set forth, the notice of hearing canceled by the district court was not an "order" within the purview of the act prescribing the procedure in suits to set aside orders of the Commission. The provisions of that statute, therefore, are inapplicable to the question here under consideration, and the authority of the district court to have issued the injunction is determinable by an application of the general principles of equity jurisprudence. Among the most important of those principles is the well-

established rule that an injunction will not issue upon the petition of a complainant having a plain, adequate, and complete remedy at law. *High on Injunctions, Fourth Edition*, sections 28–30, and cases cited.

A. The equity jurisdiction of the district court was precluded by a plain, adequate, and complete remedy at law.

If the district court had denied the injunction, and if the Commission, after hearing, had entered an order of reparation, that order, as heretofore noted, would have constituted merely a "rule of evidence" in any judicial proceeding for the enforcement of the award. In such a proceeding the appellee might have challenged the validity of the order, and if it should have been established that the Commission had exceeded its jurisdiction, the petition for a judgment on the award would properly have been denied. In other words, the appellee, in a proceeding to enforce an order of reparation, might have made precisely the same objections as were offered in support of the application for injunction.

It may be urged on behalf of the appellee that, irrespective of its legal remedy, it was nevertheless entitled, by injunction, to be saved the expense of trying out before the Commission a question not within its jurisdiction. But section 274b of the Judicial Code, approved March 3, 1915, 38 Stat. L., ch. 90, p. 956, provides:

> That in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant

> shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea.

If, therefore, the matter of reparation was *clearly beyond the jurisdiction of the Commission*, the appellee might have ignored the notice of hearing, and thereafter have challenged the validity of any order of reparation which the Commission might have entered and the enforcement of which might have been sought in an action at law. If, on the other hand, there was *any reasonable doubt* as to the jurisdiction of the Commission to enter an order of reparation, that doubt should have been resolved in favor of the Commission, and the injunction should have been denied.

The mere expense of defending the proceeding before the Commission certainly did not constitute irreparable injury, nor prevent the remedy at law from being adequate. *State* v. *Superior Court*, 30 Wash. 700. It would save expense, in practically every case in which the defendant might object to the jurisdiction of an inferior court, if the merits of the controversy could be at once determined by the court of last resort, but mere interests of economy have never been regarded by the courts as justifying an injunction against judicial or quasi-judicial proceedings.

The objection on behalf of the appellee that, if the Commission were not enjoined, it would be subjected

to a "multiplicity of suits," is refuted by the provision of section 16 of the act to regulate commerce, that "all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs." There was no allegation in the petition that the Commission would enter separate orders of reparation, even if it should enter any order other than of dismissal, or that separate suits were threatened. The injunction, therefore, is not to have been justified as preventing a multiplicity of suits.

B. The district court was without lawful authority to enjoin prospective action by the Commission.

1. *Injunction erroneously predicated upon speculation as to Commission's action*—It is evident from the nature and purpose of the motion for injunction that the gravamen of the appellee's complaint to the district court was not what the Commission *had done*, or *was doing*, but what it *might do*. This apprehension on behalf of the appellee was manifested by the allegation in the petition, Record, p. 4, that unless the district court should grant the relief for which it prayed, the Commission would—

> proceed to take further testimony in the said causes, with a view of ascertaining whether damages have been sustained by the said parties filing the said complaints, and with the further view to assessing such damages, if any be shown, and to making an award of reparation therefor in favor of complainants in the said complaints before the said Commission.

The petition further urged, Record, p. 5, that the prospective action of the Commission be enjoined, lest the appellee "be compelled to attend the said hearing" and "be put to great expense and trouble to make proper defense thereto," and, further, that unless the prayer of the complaint were granted, "in all probability" orders would be entered by the Commission awarding reparation to the complainants before it.

The appellee further urged, Record, p. 5, that unless the petition were granted, it would be subjected to—

> a multiplicity of suits at law. That in the event that reparation is awarded by the Commission, your petitioner will be placed at a great disadvantage in defending suits at law based on such award, since the Commission's finding of the ultimate facts is by statute made *prima facie* correct, and no opportunity is given petitioner to have a judicial review of the strength and competency of the evidence upon which such a finding rests.

The Commission had done nothing prior to the cancelation of the notice which would have entitled the appellee to injunctive relief. No right or duty of the carrier could have been affected, as a result of the notice, until after the Commission, pursuant thereto, had held the hearing and entered an order requiring the appellee to do or to refrain from doing a particular thing. And unless there may have been imputed to the appellee a recognition of its liability for reparation, there is no reason for it to have

assumed that, even after the hearing, the Commission would enter any order other than of dismissal.

It is therefore apparent that the injunction was based upon the merest speculation as to what the Commission would do in pursuance of the notice here under consideration. Yet no principle of equity jurisprudence is more thoroughly established than that an injunction is properly issuable only upon a definite showing of *impending and substantial* damage. *Truly* v. *Wanzer*, 5 How. 140; *Irwin* v. *Dixion*, 9 How. 9; *Hunnewell* v. *Cass County*, 22 Wall. 464, 478; *Missouri* v. *Illinois and Chicago District*, 180 U. S. 208, 248; *McChord* v. *Louisville & N. R. Co.*, 183 U. S. 483; and *Int. Com. Com.* v. *Baltimore & O. R. Co.*, 225 U. S. 326, 340.

2. *District court erroneously decided by anticipation issues primarily determinable by Commission*—That the district court was without lawful authority to enjoin the proceedings of the Commission in the instant case is established by compelling precedents.

In *Ewing* v. *City of St. Louis*, 5 Wall. 413, a circuit court of Missouri had entered a decree dismissing a bill to enjoin the enforcement of certain judgments rendered by the mayor of St. Louis against the complainant, for benefits alleged to have accrued to his property from the opening of a certain street. On appeal, this Court, affirming the decree of dismissal, held, pp. 418–419:

> With the proceedings and determinations of inferior boards or tribunals of special jurisdiction, courts of equity will not interfere,

> unless it should become necessary to prevent a multiplicity of suits or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be established by extrinsic evidence. In other cases the review and correction of the proceedings must be obtained by the writ of *certiorari*. This is the general and well established doctrine.

In *Richmond, F. & P. R. Co.* v. *Louisa R. Co.*, 13 How. 70, a state court had declined to enjoin the crossing of one railroad by another, where it was shown that the construction of the junior road *might* infringe certain charter rights of the complainant. The dismissal of the bill was affirmed by this Court for the reason, as stated, p. 81:

> That the parties will differ widely as to the construction of the grant * * * is more than probable. But on this application for an injunction against the construction of respondents' road the chancellor was not bound to decide the question, by anticipation: And, although he may have thrown out some intimation as to his present opinion on that question, he has very properly left it open for future decisions, to be settled by a suit at law, or in equity, "upon the facts of the case as they may then appear." But however probable this dispute or contest may be, it is not for this court to anticipate it and volunteer an opinion in advance.

In *Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S. 307, a suit had been brought to enjoin the Railroad Commission of Mississippi from proceeding under certain statutes of that State. The question of jurisdiction was not decided by this Court, but in directing the dismissal of the petition it was said, p. 335:

> As yet the commissioners have done nothing. There is certainly much they may do in regulating charges within the State, which will not be in conflict with the Constitution of the United States. It is to be presumed they will always act within the limits of their constitutional authority. It will be time enough to consider what may be done to prevent it when they attempt to go beyond.

In *New Orleans Water Works Co.* v. *New Orleans*, 164 U. S. 471, a bill had been filed to enjoin the respondent from enacting certain ordinances which it was alleged would be in contravention of certain decisions of this Court, and in derogation of certain privileges granted to the complainant by the State of Louisiana. The bill was dismissed and, on appeal to this Court, the judgment of dismissal was affirmed, it being held, p. 482, that—

> a court of equity ought not, by any form of proceeding, to interfere with the course of proceedings in the city council of New Orleans, and enjoin that branch of its municipal government from hereafter passing ordinances similar to those heretofore enacted and which

> are alleged to be obnoxious to the plaintiff's rights. The mischievous consequences that may result from the attempt of courts of equity to control the proceedings of municipal bodies when engaged in the consideration of matters entirely legislative in their character, are too apparent to permit such judicial action as this suit contemplates. We repeat that when the city council shall pass an ordinance that infringes the rights of the plaintiff, and is unconstitutional and void as impairing the obligation of its contract with the State, it will be time enough for equity to interfere, and by injunction prevent the execution of such ordinance. If the ordinances already passed are in derogation of the plaintiff's contract rights, their enforcement can be prevented by appropriate proceedings instituted directly against the parties who seek to have the benefit of them. This may involve the plaintiff in a multiplicity of actions. But that circumstance can not justify any such decree as it asks.

In *Wilson* v. *Lambert*, 168 U. S. 611, the Supreme Court of the District of Columbia had enjoined a commission created by an act of Congress from assessing certain property in connection with the improvement of Rock Creek Park, and the decree of injunction had been affirmed by the Court of Appeals of the District of Columbia. On appeal to this Court the decree of the court of appeals was reversed, and in remanding the cause with directions

that the bill for injunction be dismissed, this Court observed, pp. 617–618:

> The other objections, so forcibly dwelt on, are all questions of construction and administration, and should be permitted to arise and be determined in the regular procedure of the court to which Congress has assigned the duty of carrying the provisions of the act into effect. * * * It does not yet appear that these appellees will, when final action shall have been taken, have any substantial grounds of complaint. * * * Should errors supervene in the administration of the act, parties affected will have redress by appeal.

In connection with the foregoing decision, the following excerpt from the dissenting opinion in the court of appeals was quoted with approval:

> There can be no reason or propriety in appealing to a court of equity to restrain proceedings that are being conducted in other courts, competent to construe the statutes under which they act, and to decide every question that may arise in the course of the proceeding. To allow litigations to be thus diverted tends to the multiplication of litigation, and the production of unnecessary delay and expense—to say nothing of the unnecessary vexation to parties.

In *McChord* v. *Louisville & N. R. Co.*, 183 U. S. 483, the Circuit Court of the United States for the District of Kentucky had enjoined the railroad commission of that State from fixing certain rates under a statute which was alleged to be unconstitutional.

On appeal to this Court, the judgment of the circuit court was reversed, and in remanding the cases with directions to dismiss the bills, it was said, p. 502:

> The result of these considerations is that the duty of enforcing its rates rests on the Commission and that none of the consequences alleged to be threatened can be set up as the basis of equity interposition before the rates are fixed at all. Whether after they are determined their enforcement can be restrained is a question not arising for decision on this record, and we are not called on to dispose of other contentions of grave importance, which were pressed in argument, as if now requiring adjudication.

In *First National Bank* v. *Albright*, 208 U. S. 548, 553, it was held that equity will not interfere to enjoin an assessing officer from the performance of his statutory duties, merely on the ground that he *may* perform those duties wrongfully, the earliest moment at which an injunction will issue being after the assessment has actually been made.

In *Alpers* v. *San Francisco*, 32 Fed. 503, complainant sought an injunction to restrain the enactment of an ordinance which he alleged would impair the obligation of a contract which he had made with the city. Mr. Justice Field, however, denying the injunction, said, p. 507:

> Municipal corporations are instrumentalities of the State for the more convenient administration of local affairs, and for that purpose are invested with certain legislative power. In the exercise of that power, upon the subjects submitted to their jurisdiction, they are as much

> beyond judicial interference as the legislature of the State. The courts can not in the one case forbid the passage of a law nor in the other the passage of a resolution, order, or ordinance. If by either body, the legislature or the board of supervisors, an unconstitutional act be passed, its enforcement may be arrested. The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the State, or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative action threatened may be in disregard of constitutional restraints and impair the obligation of a contract, as alleged in this case, does not affect the question. It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary.

In *Rico* v. *Snider*, 134 Fed. 953, 958, an injunction to restrain the contemplated action of certain officials was denied, for the reason that:

> The case, in its present state, is one where, power to act having been delegated to the board of supervisors, the wisdom or need for the exercise of power one way or another are questions which rest primarily within the appropriate jurisdiction of such board and ought not to be decided in advance by the court. * * * The duty of considering and acting being upon the board the possible consequences of one course of action can not be set up as the basis of equity interposition

> before the board has acted at all. *McChord* v. *Louisville*, 183 U. S. 495, 22 Sup. Ct. 165, 46 L. Ed. 289. Whether, after the board has acted, the execution of its acts can be restrained, is a question not necessarily calling for adjudication at this time.

The decision of the Circuit Court of Appeals for the Eighth Circuit, in *Chicago, B. & Q. Ry. Co.* v. *Winnett*, 162 Fed. 242, is peculiarly illuminative of the question here under consideration. The Nebraska State Railway Commission, in that case, had served notice on the appellant that on a certain date in the future it would consider the question of establishing certain rates as shown in a schedule appended to the notice; and that such rates would be adopted with such changes and modifications as should be deemed necessary unless good and sufficient cause were shown to the contrary. In response to this notice the carrier filed a petition to restrain the state commission from proceeding in the premises. A temporary restraining order was granted, but after hearing was dissolved and a temporary injunction was denied. The carrier declined to plead further, and a final decree dismissing the bill was entered. On appeal to the circuit court of appeals the decree of the circuit court dismissing the petition was affirmed.

The circuit court of appeals noted, in its opinion, that inasmuch as the commission at the time of the filing of the bill for injunction had not established any rates the obvious purpose of the bill was "to

perpetually restrain" the commission "from even considering the question of establishing or fixing a rate." Considering the petition in the light of this apparent purpose, it was said, p. 247:

> It must be conceded, we think, that the Nebraska State Railway Commission can not interfere with a power of Congress to regulate interstate commerce nor confiscate the property of appellant by the mere consideration of the question mentioned in the notice of August 17, 1907; but, *even if it could, the judiciary can not control its actions in advance*. The great political truth that "the accumulation of all powers legislative, executive, and judiciary, in the same hands whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may be justly pronounced the very definition of tyranny," has always been recognized by those who have struggled for liberty in the years that are gone, and it has always formed one of the great basic principles upon which the national and state governments have been founded. * * * The fact that the appellant might be subjected to a multiplicity of suits, or that it might suffer irreparable damage when compared with the necessity of maintaining in all its integrity the proposition that the judiciary will not seek to control legislative action in advance is dwarfed into insignificance. [Italics ours.]

It was also urged on behalf of the railroad in the case last cited that even though the circuit court should have declined in advance to enjoin

the action of the state commission, the latter nevertheless should have been perpetually enjoined "from giving any notice to appellant of any rates that they may fix." The circuit court of appeals, however, overruling this contention, said, pp. 248–249:

> The first objection against granting the relief claimed is that prior to the fixing of the rate this court is bound by a conclusive presumption that the railway commission will act justly, fairly, and within the limits of its power.
>
> The second objection to the issue of a perpetual injunction against giving a notice of the fixing of a rate is that courts only concern themselves with real controversies. It certainly can not be the law that the different railroads in a particular State after a commission has been empowered to fix rates may file a bill in equity in the United States Circuit Court for the proper district and obtain an injunction restraining the commission from putting into effect any schedule of rates which it may thereafter adopt. * * *
>
> The decree could rest only upon proof that the rates, notice of which is to be restrained, were void for some valid reason, and as the rates are not yet fixed, and the court has no authority to interfere in advance with the fixing thereof, it results that inherently and fundamentally the bill must fail to support the relief now under discussion.

In *In re Chetwood*, 165 U. S. 443, 460, it was held that—

> where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right can not be arrested or taken away by proceedings in another court * * *.

In *Riggs* v. *Johnson County*, 6 Wall. 166, 195–196, it was said:

> Circuit courts and state courts act separately and independently of each other, and in their respective spheres of action the process issued by the one is as far beyond the reach of the other as if the line of division between them "was traced by landmarks and monuments visible to the eye."

The purport of the foregoing decisions may be summarized as prohibiting any court from interfering with the proceedings of any other court or legislative body or of any official or special tribunal charged with the performance of quasi-judicial or quasi-legislative functions. The theory upon which the district court enjoined the Commission from proceeding in the instant case is clearly refuted by that principle as applied in those decisions. And whether the functions of the Commission in a given case are quasi-legislative, as in the establishment of a rate, or quasi-judicial, as in awarding reparation, it is imperative, if the purpose of the statute is to be fulfilled, that the Commission be protected from a usurpation of those functions by the courts.

3. *District court should have assumed that Commission would perform duties in good faith*—If the appellee was not liable for reparation, the district court, as well as the carrier, should have assumed that the findings of the Commission, in good faith, would be in accordance with the evidence, and that the only order which would be entered by the Commission would be an order of dismissal. Such an order would have been reasonably incident to the fulfillment by the Commission of its official duty, and it is to have been presumed that the Commission in good faith would fulfill that duty. *Wigmore on Evidence*, Vol. IV, sec. 2534; *Moffat* v. *United States*, 112 U. S. 24, 30; *Gonzales* v. *Ross*, 120 U. S. 605, 616; *Howard* v. *Illinois Central R. Co.*, 207 U. S. 463, 509; *Rico* v. *Snider*, 134 Fed. 953, 958; and *Chicago, B. & Q. Ry. Co.* v. *Winnett*, 162 Fed. 242, 248.

C. A suit to enjoin the Commission from proceeding in the instant case, if maintainable at all, should have been filed in the Supreme Court of the District of Columbia, and not in the District Court of the United States for the Eastern District of Illinois.

If the decree of the district court had been restricted to the cancelation of the notice here involved, its effect would have been merely to enjoin the hearing with respect to which that notice had been given. The Commission in that event might lawfully have reassigned the case for hearing either at St. Louis or at Washington, and in the absence of further interference from the courts, might have concluded its investigation. Such a course, however,

was precluded by the provisions of the decree whereby the Commission was "permanently enjoined from further proceeding with the hearing of the several complaints, or any of them."

In other words, the district court, by an assumption of extraterritorial jurisdiction, restrained the Commission, not only from holding the hearings at St. Louis but from reassigning the case for hearing either at St. Louis or elsewhere, or from taking any further action in the premises. The district court, by so doing, abrogated the provisions of section 19 of the act to regulate commerce, whereby the Commission is empowered to "hold special sessions in any part of the United States," and contravened the well-established rule that proceedings to compel or to enjoin administrative action by officials of the Government are cognizable exclusively by the courts of the District of Columbia.

In *Gaines* v. *Thompson*, 7 Wall. 347, 349–350, this Court, through Mr. Justice Miller, said:

> In the case of *McIntire* v. *Wood* [7 Cr. 504] an application was made to the Circuit Court for the District of Ohio for a *mandamus* to the register of the land office, to compel him to issue certificates of purchase to plaintiff for lands to which he supposed himself entitled by law. This court was of opinion that no power had been vested by Congress in the circuit courts to issue the writ in such cases. * * * But in *Kendall* v. *United States* [12 Pet. 524] the majority of the court held that the courts of the District of Columbia had a

larger power than the circuit courts, and could issue writs of mandamus to federal officers in proper cases.

In *Secretary* v. *McGarrahan*, 9 Wall. 298, 312, Mr. Justice Clifford, referring to the jurisdiction of the Supreme Court of the District of Columbia to issue writs of mandamus to federal officers in proper cases, said:

> Antecedent to the decision of this court in the case of *Kendall* v. *The United States* [12 Pet. 608] grave doubts were entertained whether any court established by an act of Congress possessed any such jurisdiction; but the majority of this court came to the conclusion in that case that the circuit court of this district might issue the writ of mandamus to an executive officer residing here, commanding him to perform a ministerial act required of him by law, and it is not denied that the court below possesses all the power in that behalf which the circuit court of the district possessed at that time. Subsequent decisions of this court have affirmed the same principle; but in all of the subsequent cases the principle is strictly limited to the enforcement of mere ministerial acts not involving the necessity of taking proofs, and it has never been extended to cases where controverted matters were to be judicially heard and decided by the officer to whom the writ is required to be addressed. *Decatur* v. *Paulding*, 14 Pet. 497; *Brashear* v. *Mason*, 6 How. 99.

In *United States* v. *Schurz*, 102 U. S. 378, 393, this Court held that the jurisdiction of the Supreme Court

of the District of Columbia extended to the issuance of mandamus in cases in which the parties were by the common law entitled thereto. In this connection it was said:

> We are met at the threshold of this inquiry by a denial of the authority of the Supreme Court of the District of Columbia to issue a writ of *mandamus*, as an original process.
>
> The argument is, that the jurisdiction of that court over this class of subjects is governed by sec. 760 of the Revised Statutes relating to the District of Columbia. That section enacts that "the Supreme Court shall possess the same power and exercise the same jurisdiction as the circuit courts of the United States." As this court decided in *McIntire* v. *Wood* (7 Cranch. 504) and *McClung* v. *Silliman* (6 Wheat. 598) that the circuit courts of the United States possessed no such power, the argument would be perfect if no other powers on that subject existed in the Supreme Court of the District than what is conferred by the above section.

In *West* v. *Hitchcock*, 19 App. D. C. 333, 342, it was held by the Court of Appeals of the District of Columbia that:

> By a long and well-known series of cases in the Supreme Court of the United States, from that of *Marbury* v. *Madison*, 1 Cranch. 137, to that of *Roberts* v. *United States*, 176 U. S. 221, the law of *mandamus* has been well settled, so far as it concerns the authority of the courts of the District of Columbia to issue

> that writ to the head of a department of the Federal Government or the chief of a bureau upon whom some special duty has been devolved by law.

In *Dunlap* v. *Black, Commissioner of Pensions*, 128 U. S. 40, 45, this Court, referring to the case of *Marbury* v. *Madison*, 1 Cr. 137, said:

> Whilst this opinion will always be read by the student with interest and profit, it has not been considered as invested with absolute judicial authority except on the question of the original jurisdiction of this court. *The decision on this point has made it necessary for parties desiring to compel an officer of the Government to perform an act in which they are interested to resort to the highest court of the District of Columbia for redress.* It has been held in numerous cases, and was held after special discussion in the cases of *Kendall* v. *The United States*, 12 Pet. 524; and *United States* v. *Schurz*, 102 U. S. 378, that the former Circuit Court of the District and the present Supreme Court of the District, respectively, were invested with plenary jurisdiction on the subject. On this point there is no further question. [Italics ours.]

The jurisdiction of the courts of the District of Columbia, in mandamus or injunction proceedings against officials of the Government was likewise recognized by this Court in *Brashear* v. *Mason, Secretary of the Navy*, 6 How. 92; *Reeside* v. *Walker, Secretary of the Treasury*, 11 How. 271; *Tucker* v. *Seaman, Supt. of Public Printing*, 17 How. 224;

United States v. *Guthrie*, 17 How. 284; *Commissioner of Patents* v. *Whiteley*, 4 Wall. 522, 533; *United States* v. *Commissioner*, 5 Wall. 563; *United States* v. *Schurz*, 102 U. S. 378; *Butterworth, Commissioner of Patents* v. *United States ex rel. Hoe et al.*, 112 U. S. 50; *United States ex rel. Redfield* v. *Windom*, 137 U. S. 636; *United States ex rel. Boynton* v. *Blaine*, 139 U. S. 306; *Noble* v. *Union River Logging R. Co.*, 147 U. S. 165; *United States ex rel. International Contracting Company* v. *Lamont*, 155 U. S. 303; *Roberts* v. *United States*, 176 U. S. 221; *Garfield, Secretary of the Interior* v. *Goldsby*, 211 U. S. 249; and *Parish* v. *MacVeagh, Secretary of the Treasury*, 214 U. S. 124.

Section 19 of the act to regulate commerce provides "that the principal office of the Commission shall be in the city of Washington," and service of legal process is properly made upon the Commission only at Washington. In this connection a distinction is to be noted between the venue of a proceeding to annul an order of the Commission and that of a proceeding to enjoin the Commission from entering an order.

The district court jurisdiction act provides that:

> The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made

> upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office.

If the proceeding here under review had been, as it purported to be, a suit to annul an *order* of the Commission it might properly have been instituted in the District Court of the United States for the Eastern District of Illinois. As hereinabove noted, however, it was in reality a proceeding to enjoin the Commission from proceeding in the premises, and as such was governed, not by the district court jurisdiction act, but by the general rules of equity jurisprudence. If, therefore, the proceedings of the Commission in the instant case had been subject to restraint by any court, that power must have been exercised exclusively by the Supreme Court of the District of Columbia.

In *Humboldt Steamship Co.* v. *White Pass & Yukon Route*, 19 I. C. C. 105, the Commission held that it had no jurisdiction over carriers operating in Alaska. The complainant thereupon filed in the Supreme Court of the District of Columbia a petition for mandamus to compel the Commission to take jurisdiction of the case. That petition being denied, complainant appealed to the Court of Appeals of

the District of Columbia, whereby the judgment of the Supreme Court of the District was reversed and the case was remanded "with directions to issue a peremptory writ of mandamus" requiring the Commission to "take jurisdiction of said cause and proceed therein as by law required." *United States ex rel. Humboldt Steamship Co.* v. *Int. Com. Com.*, 37 App. D. C. 266, 279. A writ of error having been granted by this Court, the judgment of the Court of Appeals of the District of Columbia was affirmed. *Int. Com. Com.* v. *United States ex rel. Humboldt Steamship Co.*, 224 U. S. 474, 485.

In *Louisville Cement Co.* v. *Louisville & N. R. Co.*, 28 I. C. C. 732, it was held that certain claims for reparation not filed with the Commission within two years from the date of delivery of the shipments involved were barred by the statute of limitations. An application for mandamus to compel the Commission to take jurisdiction of such claims was denied by the Supreme Court of the District of Columbia, and the judgment of that court was affirmed by the Court of Appeals of the District. *United States ex rel. Louisville Cement Co.* v. *Int. Com. Com.*, 42 App. D. C. 514. From the judgment of the latter court, an appeal was taken to this Court, where the cause is now pending submission.

III.

THE COMPLAINTS BEFORE THE COMMISSION IN THE INSTANT CASE WERE SUBJECT TO ITS JURISDICTION.

As hereinabove noted, each of the petitioners before the Commission asked for reparation for the failure of the appellee to furnish (1) the full number of coal cars which the petitioner had requested, and (2) the proportion of the available car supply to which the petitioner was entitled. By stipulation of counsel the charges of discrimination were withdrawn, and the cases were submitted on a single issue of damages resulting from the failure of the appellee to furnish cars upon demand. The district court decided that this issue was not properly determinable by the Commission, and upon that decision rests the decree here under consideration. A question is therefore presented as to whether or not the Commission may lawfully award reparation for the failure of a carrier to furnish, upon reasonable request of a shipper, such cars as may be needed for the transportation of his interstate shipments.

A. The act imposed upon the appellee a duty to furnish the cars demanded by the complainants before the Commission.

Section 1 of the act defines the word "transportation," as therein employed, as including "cars and other vehicles and all instrumentalities of shipment or carriage," and provides that—

> it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable re-

> quest therefor, and to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto.

Referring to the foregoing provisions of section 1, this Court, in *Chicago, R. I. & P. Ry. Co.* v. *Hardwick Farmers Elevator Co.*, 226 U. S. 426, 434, declared:

> The purpose of Congress to specifically impose a duty upon a carrier in respect to the furnishing of cars for interstate traffic is of course by these provisions clearly declared. * * * Not only is there, then, a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the act to regulate commerce give remedies for the violation of that duty.

In *Pennsylvania R. Co.* v. *Sonman Shaft Coal Co.*, 242 U. S., 120, it was held, under normal traffic conditions, to be the duty of carriers, imposed by section 1 as well as by the common law, to furnish to shippers, upon reasonable demand, a sufficient number of cars to satisfy the actual needs of their interstate business. The statutory duty of carriers to furnish cars upon the reasonable request of shippers was likewise recognized by this Court in *Southern Ry. Co.* v. *Reid*, 222 U. S. 424, 440; *Yazoo & M. V. R. Co.* v. *Green-*

wood Grocery Co., 227 U. S. 1, 3; *St. Louis, I. M. & S. Ry. Co.* v. *Edwards*, 227 U. S., 265, 269; *Hampton* v. *St. Louis, I. M. & S. Ry. Co.*, 227 U. S. 456, 465; and *United States et al.* v. *Pennsylvania R. Co.*, 242 U. S. 208, 233.

It is therefore submitted that the appellee was charged by section 1 of the act with a duty to furnish, upon reasonable demand, such cars as may have been reasonably necessary for the interstate business of the petitioners before the Commission.

B. The violation by the appellee of its statutory duty to furnish cars subjected it to liability for reparation.

Section 8 of the act to regulate commerce provides:

> That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, * * *.

The failure of the appellee to furnish to the petitioners before the Commission such cars as may have been reasonably necessary for their interstate business constituted an omission "to do any act, matter, or thing in this act required to be done," and rendered the appellee liable to the petitioners for the full amount of the damages thereby sustained. Upon

the establishment of such damages this liability became absolute and unconditional. The only question then to be determined is whether or not the Commission was empowered to ascertain such damages and to award reparation therefor.

C. The Commission was empowered by the statute to award reparation for the failure of the appellee to furnish cars.

Section 9 of the act to regulate commerce provides:

> That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt.

The reference in section 9 to the procedure "hereinafter provided for" relates to the provisions of section 13 of the act, as amended:

> That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act, in contravention of the

> provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. * * * If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Supplementing the foregoing provisions of section 13, it is provided by section 16 of the act as amended:

> That if, after hearing on a complaint made as provided in section thirteen of this act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

It was not only the *right* but the *duty* of the Commission to investigate the allegations with respect to the failure of the appellee to furnish cars, and to award such reparation therefor as might have been warranted by the facts of record. The jurisdiction of the Commission in such cases was expressly recog-

nized by this Court in *Pennsylvania R. Co.* v. *Clark Coal Co.*, 238 U. S. 456, 469, wherein it was said:

> The Commission also had authority to make examination and report upon the amount of damages which the plaintiff had suffered from the unjust discrimination alleged in its complaint. We deem the provisions of the act to be clear upon this point. See sections 8, 9, 13, 16. There is nothing in the act to suggest that the damages which may thus be ascertained are only those arising from unreasonable or unjustly discriminatory rates. Rules as to car distribution that are unjustly discriminatory are within the purview of section 3, and damages thereby occasioned, as well as those due to the exaction of unreasonable rates, arise from the violation of the act and their ascertainment is within the scope of the Commission's authority.

The case last cited, as well as the case of *Baltimore & O. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, *supra*, involved a question of *inequality in the distribution of*, rather than a *failure to furnish*, cars, but the remedies provided by section 9 for an injury resulting from the failure of a carrier, under section 1, to furnish cars, are identical with those provided for an injury resulting from discrimination under section 3. The principles decided in those cases, moreover, while applicable primarily to discrimination in the distribution of cars, are likewise applicable to the facts here under consideration, for the reason that a shipper who has been denied his just proportion of the avail-

able car supply has sustained an injury additional to and quite distinct from that resulting from the carrier's preference of a competitor.

In *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, 257, it was said:

> Section 9 gives the plaintiff the option of going before the Commission or the courts for damages occasioned by a violation of the statute. But since the Commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the Commission that the practice or the rate was thus unreasonable and therefore illegal and prohibited.

In *Morrisdale Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 304, 313, this Court, referring to a system of coal car distribution which had been challenged by the appellant as unduly discriminatory, held that—

> the question as to the reasonableness of a rule of car distribution is administrative in its character, and calls for the exercise of the powers and discretion conferred by Congress upon the Commission.

In *Pennsylvania R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, and *Illinois Central R. Co.* v. *Mulberry Hill Coal Co.*, 238 U. S. 275, this Court sustained certain judgments of state courts awarding damages for the failure of carriers to furnish cars, but in *Pennsyl-*

vania R. Co. v. *Clark Coal Co.*, 238 U. S. 456, *supra*, those cases were distinguished, p. 472, as follows:

> In the cases cited the plaintiff had not invoked the jurisdiction of the Commission. In this case it had done so. It went before the Commission, with its complaint under the act, assailing the rule of the company, and it secured from the Commission a finding as to the illegality of the rule and the violation of the act. This proceeding established the character of the claim so far as interstate transactions were concerned, and it could be prosecuted solely under the federal statute.

The case of *Pennsylvania R. Co.* v. *Sonman Shaft Coal Co.*, 242 U. S. 120, originated in a state court, but it is in several respects analogous to the instant case. Thus the claim of the Sonman Company for reparation was based upon the allegation (1) that the carrier had failed to furnish it with a sufficient number of cars to meet the needs of its coal mine, and (2) that the carrier, in the distribution of coal cars, had discriminated unjustly against it and in favor of its competitors. As in the instant case, the second ground of complaint was withdrawn by the petitioner at the trial, leaving the issue before the court the matter of reparation for the failure of the carrier to furnish cars upon demand.

A judgment rendered by the trial court in favor of the complainant was affirmed by the Supreme Court of Pennsylvania, whence the case was brought on a writ of error to this Court. It was urged on behalf of the appellant that the state court, in entering judg-

ment for the petitioner, had exceeded its jurisdiction, as the matter of reparation was cognizable exclusively by the Commission; but this Court, refuting that contention, p. 124, referred to the decision in the *Puritan Coal Case*, 237 U. S. 121, 131–132, *supra*, as having held—

> that claims for damages arising out of the application in interstate commerce of rules for distributing cars in times of shortage call for the exercise of the administrative authority of the Commission where the rule is assailed as unjustly discriminatory, but where the assault is not against the rule but against its unequal and discriminatory application, no administrative question is presented and the claim may be prosecuted in either a federal or a state court without any precedent action by the Commission, * * *.

The judgment in favor of the petitioner for reparation was accordingly affirmed. The decision in the *Sonman Case* clearly recognized the jurisdiction of the Commission as concurrent with that of the state and federal courts in matters of reparation for the failure of carriers to furnish cars. In this connection it was said, p. 123:

> It is true that sections 8 and 9 deal with the redress of injuries resulting from violations of the act and give the person injured a right either to make complaint to the Interstate Commerce Commission or to bring an action for damages in a federal court, but not to do both.

In other words, the charges of discrimination in the instant case having been abandoned, the complainants might have sought redress for the failure of the appellee to furnish cars either in the courts or before the Commission, but the Commission having assumed jurisdiction in the premises, the original jurisdiction of the courts, either of any State or of the United States, was excluded. In *United States* v. *Louisville & N. R. Co.*, 195 Fed. 88, 92, it was held by the Commerce Court that:

> This court has no jurisdiction to consider the question of car distribution in advance of some action by the Interstate Commerce Commission or to determine how many cars the Southern Railway shall furnish or how many the Louisville & Nashville Railroad shall furnish for the transportation of the petitioners' coal. It is believed, however, that this court has the undoubted jurisdiction upon the facts presented by the record to issue a writ or writs of mandamus directed to these common carriers, commanding them that, so long as they establish and maintain through routes and joint rates to Southeastern territory, they shall move and transport in interstate commerce the coals of the petitioners when tendered in such reasonable quantities as may be determined either by agreement with the carriers or by the Interstate Commerce Commission if they can not agree.

1. *Tank Car Cases, 242 U. S. 208, distinguished*—It may be argued on behalf of the appellee that the jurisdictional questions in the instant case are determined by the decision of this Court in *United States* v.

Pennsylvania R. Co., 242 U. S. 208, usually referred to as the *Tank Car Cases*. Such a contention, however, may be refuted by an analysis of that decision whereby it is clearly distinguishable from the case at bar.

The orders of the Commission in the *Tank Car Cases* had required the railroad company to *provide* and *furnish* to certain shippers such cars *of a special type* as were reasonably necessary for the transportation of their normal shipments in interstate commerce. The issue before this Court was stated in the opinion as follows, pages 217, 218–219:

> The question in the case is, Has the Commission the jurisdiction exercised by the order? It is not denied that the Commission has power over the general equipment of a carrier, but it is denied that it has power to require "vehicles of a special type having no reference to the safety of transportation," and to this distinction the argument of counsel for the railroad company is addressed. * * * In other words, the main question presented is, whatever be the duty of carriers as to the equipment they must have or furnish, whether the Interstate Commerce Commission is the tribunal to enforce the duty.

Further limiting the question upon which the *Tank Car Cases* were to be decided, it was said, p. 229:

> The request was for a special facility, a combination of package and car, and the question then is whether the neglect to provide it or to furnish it was a "practice" within the meaning of section 15.

In other words, the issue in the *Tank Car Cases* was whether or not the Commission is empowered by *section 15* of the act to *require a carrier to provide equipment of a special type additional or preferable to that already available*, and to furnish such special equipment upon the reasonable demand of shippers.

The jurisdictional issue in the case at bar is whether or not the Commission is empowered by *sections 9, 13, and 16* of the act *to award reparation for the failure of a carrier* to furnish upon the reasonable request of shippers such equipment *of a conventional type* as may be reasonably necessary for the transportation of their interstate shipments. The duty so to furnish such equipment is imposed by section 1 of the act, and the remedy for the violation of that duty is provided by sections 8 and 9, the jurisdiction of the Commission to apply that remedy being made by section 9 coordinate with the jurisdiction of the courts.

The duty of carriers in the instant case is so clearly analogous to their duty as defined in the *Hardwick Elevator Case, supra*, that the language employed by this Court in distinguishing that case from the *Tank Car Cases*, is likewise conclusive in distinguishing the latter cases from the case at bar. Thus this Court, referring to its decision in the *Hardwick Elevator Case*, declared, p. 234:

> This was based upon the definitions of section 1 and the provisions of sections 8 and 9. The questions in the case were not those in the present case. The kinds of equipment were not involved nor the questions dependent upon them.

The power of the Commission *under section 15* to require a carrier to provide equipment of a special type, "having no reference to the safety of transportation," is clearly distinguishable from the power of the Commission *under sections 8, 9, 13, and 16* to award reparation for the failure of a carrier under section 1 to furnish cars. It is therefore submitted that the *Tank Car Cases* are distinguishable from the case at bar, but that, in so far as they are applicable thereto, they support the contentions herein made on behalf of the appellants.

CONCLUSION.

Carriers subject to the act are required by section 1 to furnish cars upon the reasonable demand of shippers, and the failure of a carrier, under normal traffic conditions, so to do constitutes a violation of the statute for which it is liable in damages for the injury thereby sustained. Such damages, under section 9, are recoverable either in the courts or in a proceeding before the Commission, but the jurisdiction of either, having once attached, is exclusive. The complainants before the Commission alleged that the appellee had failed, after reasonable demand, to furnish the cars actually needed for their interstate business, and asked for reparation. Upon these allegations, it was not only the right but the duty of the Commission, under sections 8, 9, 12, 13, and 16 of the act, to investigate the complaints, and if they were well founded, to award reparation for

the injury resulting from the failure of the appellee to furnish cars.

But irrespective of any question of jurisdiction in the Commission, the district court could not lawfully have annulled the notice of hearing issued by the Commission for the reason that that notice was not an "order" subject to injunction by any court. The district court, moreover, was without lawful authority to enjoin the proceedings of the Commission for the reason that such a power, if vested in any court, was vested exclusively in the Supreme Court of the District of Columbia.

It is therefore apparent that the district court, in canceling the notice of hearing and enjoining the proceedings of the Commission, exceeded its authority and transgressed the principles of equity jurisprudence applied by this Court since the establishment of the Government. Upon these considerations it is respectfully submitted that the decree of the district court should be reversed and that the cause should be remanded, with directions to dismiss the petition of the appellee for want of jurisdiction.

JOSEPH W. FOLK,
Counsel for the Interstate Commerce Commission.

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TABLE OF CASES.

TABLE OF STATUTES.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION, appellants,
v.
ILLINOIS CENTRAL RAILROAD COMPANY. } No. 310.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ILLINOIS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The Illinois Central Railroad Company instituted this suit in the District Court of the United States for the Eastern District of Illinois against the United States to annul a notice, issued by the Interstate Commerce Commission, assigning for hearing before it the complaints of three coal companies, which alleged damages and sought reparation because of failure of the railroad company, upon reasonable request therefor, to furnish an adequate supply of cars and transportation for the output of their mines; and

also to enjoin the Commission from proceeding further with the hearing of said complaints. The notice was as follows:

> No. 6128—Vulcan Coal and Mining Company *vs.* Illinois Central Railroad Company. No. 6128 Sub-No. 1—St. Louis-Coulterville Coal Company *vs.* Illinois Central Railroad Company. No. 6128 Sub-No. 2—Groom Coal Company *vs.* Illinois Central Railroad Company.
>
> The above-entitled cases are assigned for hearing October 1, 1915, ten o'clock a. m., at Hotel Jefferson, St. Louis, Mo., before Examiner Wilson.
>
> By the Commission.
>
> (Signed) GEORGE B. MCGINTY,
> *Secretary.*

The Commission had previously held a hearing upon the complaints of the coal companies, at which, by a majority opinion (R. 20; 33 I. C. C. 52), the railroad's plea to the jurisdiction had been overruled and further consideration of the complaints left for a subsequent hearing. The above notice was issued for the holding of the deferred hearing.

The petition in the present case avers that the complaints of the three coal companies originally alleged discrimination in the distribution of cars as well as failure to furnish an adequate supply thereof, but that upon the hearing before the Commission the charge of discrimination was abandoned; that the Commission was without jurisdiction to entertain the complaints of the coal companies, especially in

the absence of any charge of discrimination; and that to allow it to proceed with the hearing would subject the railroad company, in the event reparation were awarded, to great trouble and expense and would compel it to defend three suits at law based upon the anticipated awards. It was further alleged that, since awards of reparation are made prima facie correct, petitioner would be deprived of "a judicial review of the strength and competency of the evidence upon which such a finding rests." (R., 5.)

The case proceeded upon the theory that the notice was an order of the Commission which could be annulled under the provisions of the act creating the Commerce Court (June 18, 1910; c. 309, 36 Stat. 539), and three judges were called to sit therein as required by the urgent deficiency act of October 22, 1913 (c. 32, 38 Stat. 208, 220). (R., 45.)

Motions to dismiss the petition were filed by the Government and the Interstate Commerce Commission, which had intervened. (R., 46, 48, 49.) The Commission also filed an answer. (R., 49.) The grounds of the motions to dismiss were, in substance, that the notice above quoted was not an order within the meaning of the act, and that the court had no jurisdiction to annul same or to enjoin the hearing of the complaints; that suits to enjoin the Commission could be brought only in the District of Columbia; that the Commission had jurisdiction to hear the complaints of the coal companies, and that there was no equity in the bill.

The motions to dismiss were overruled and a temporary injunction granted. (R., 47, 76.) The defendants elected to plead no further, and the court thereupon entered a final decree canceling the notice and perpetually enjoining the Commission "from further proceeding with the hearing of the said complaints, or any of them." (R., 76, 77.) The case is here upon appeal from this final decree.

SPECIFICATIONS OF ERROR.

The assignments of error appear on pages 78 and 79 of the record. In substance, they charge that the court erred in overruling the motions to dismiss the petition for want of jurisdiction and want of equity; in holding that the Commission was without authority to hear and determine the complaints of the coal companies then pending before it; and in canceling the notice setting the cases for a hearing and in enjoining the Commission from proceeding further with the hearing thereof.

ARGUMENT.

I.

The district court had no jurisdiction to cancel the alleged order nor to enjoin the hearing before the Commission.

The Government can not be sued except with its consent. (*Minnesota* v. *Hitchcock*, 185 U. S. 373, 386; *Oregon* v. *Hitchcock*, 202 U. S. 60; *United States* v. *Lee*, 106 U. S. 196, 207; *Kansas* v. *United States*, 204 U. S. 331, 341.)

The United States has not consented to the bringing of this suit, unless it has done so by the act of June 18, 1910, creating the Commerce Court (c. 309, 36 Stat. 539), and the act of October 22, 1913 (c. 32, 38 Stat. 208, 219), abolishing it. Section 4 of the former act provides that "all cases and proceedings in the commerce court which but for this Act would be brought by or against the Interstate Commerce Commission shall be brought by or against the United States." Section 1 of the same act confers upon the Commerce Court jurisdiction over "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." The latter act transfers jurisdiction over such cases to "the several district courts of the United States."

It is manifest, therefore, that the district court had no jurisdiction over the present case unless the notice of the Interstate Commerce Commission assigning the coal-car cases for hearing was an order within the meaning of the Commerce Court Act, as claimed by appellee.

The alleged order was nothing more than a notice of a hearing which appellee might attend or not as it saw fit. It compelled neither "the doing or abstaining from doing of acts embraced by previous affirmative command of the Commission." (*Procter & Gamble* v. *United States*, 225 U. S. 282, 293.) Failure to appear would not have subjected appellee to penalty for violating any order of the Commission, and the only inconvenience that would have been

suffered, in the event of a subsequent order awarding reparation, would have been the establishment of a rebuttable presumption in favor of the correctness of the award.

Therefore, even if this notice should be considered an order, it certainly is not such an affirmative order as, under the rulings of this court, may be enjoined by district courts.

> Giving to these words their natural significance we think it follows that they confer jurisdiction only to entertain complaints as to affirmative orders of the commission; that is, they give the court the right to take cognizance when properly made of complaints concerning the legality of orders, rendered by the commission and confer power to relieve parties in whole or in part from the duty of obedience to orders which are found to be illegal. (*Procter & Gamble* v. *United States*, 225 U. S. 282, 293.) See, also, *Lehigh Valley Railroad Company* v. *United States*, No. 733, October Term, 1916, decided by this court March 26, 1917.

Since the United States has not consented to be sued in a proceeding of this kind, the district court had no jurisdiction over it, nor over the Commission, as an administrative body, because the latter is only sued indirectly in the proceeding against the United States.

No attempt was made in the present case to proceed against the members of the Commission individually in the district whereof they were inhabitants.

(Judicial Code, sec. 51.) But even had this been done, the suit would have been unauthorized by statute, and determinable only upon general principles of equity jurisdiction. The petition in this case was without equity.

II.

There is no equity in the bill.

It is elemental that an injunction will not be granted, if there is an adequate remedy at law. (Judicial Code, sec. 267.) This remedy may be by appeal or otherwise.

The Act to Regulate Commerce provides an adequate remedy at law by which appellee in this case may have determined not only the question of the Commission's jurisdiction over the complaints but also the correctness in law or in fact of any award of reparation that the Commission might make.

Section 9 of the act provides that the shipper may either make complaint before the Commission or bring suit "for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." (C. 104, sec. 9, 24 Stat. 379, 382.)

Where, however, the shipper elects to proceed before the Commission, the award of damages, if any,

is only prima facie correct, and, if the carrier fails to comply therewith, can only be enforced in a suit upon the award in a court having jurisdiction of the parties. Section 16 of the act provides:

> That if, after hearing on a complaint made as provided in section thirteen of this Act, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.
>
> If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court [now district court] of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the circuit court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor

> for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. * * * (C. 309, 36 Stat. 539, 554, sec. 13, amending sec. 16 of the act.)

In construing the above section this court has held:

> This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents. Nor does it in any wise work a denial of due process of law. In principle it is not unlike the statutes in many of the States whereby tax deeds are made *prima facie* evidence of the regularity of all the proceedings upon which their validity depends. Such statutes have been generally sustained, *Pillow* v. *Roberts*, 13 How. 472, 476; *Marx* v. *Hanthorn*, 148 U. S. 172, 182; *Turpin* v. *Lemon*, 187 U. S. 51, 59; Cooley's Constitutional Limitations, 7th ed. 525, as have many other state and Federal enactments establishing other rebuttable presumptions. *Mobile &c. Railroad* v. *Turnipseed*, 219 U. S. 35, 42; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 81; *Reitler* v. *Harris*, 223 U. S. 437; *Luria* v. *United States*, 231 U. S. 9, 25. An instructive case upon the subject is *Holmes* v. *Hunt*, 122 Massachusetts, 505, where, in an elaborate opinion by Chief Justice Gray, a statute making the report of an auditor *prima facie* evidence at the trial

> before a jury was held to be a legitimate exercise of legislative power over rules of evidence and in no wise inconsistent with the constitutional right of trial by jury. And in *Chicago, &c. Railroad* v. *Jones*, 149 Illinois 361, 382, a like ruling was made in respect of a statutory provision similar to that now before us. (*Meeker & Co.* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412, 430–431.)

See also *Mills* v. *Lehigh Valley R. R. Co.*, 238 U. S. 473, 481.

It is immaterial that the award of the Commission is reviewable in a separate action rather than in a direct appellate proceeding. The essential thing is that adequate means are provided whereby the jurisdiction of the Commission and the legality of the award may be tested and all defenses, legal or equitable (Judicial Code, sec. 274b), may be made effective. (*Hyatt* v. *Bates*, 40 N. Y. 164; *Atlanta & West Point Railroad Co.* v. *Redwine*, 123 Ga. 736, 738, 739; *Board of Comm'rs of Laporte County* v. *Wolff*, 166 Indiana, 325, 330, 76 N. E. Rep. 247, 249; *Weber* v. *Timlin*, 37 Minn. 274; High on Injunctions, 3d ed. 108, 109.)

Furthermore, the Commission, in the cases pending before it, may find in favor of appellee and none of the consequences alleged may ever arise; or, if the Commission should award reparation, the finding may not be upheld upon suit thereon.

This suit to enjoin the Commission is, then, premature. It will be time enough to determine the

question of jurisdiction when, if ever, an award adverse to appellee is brought before the court for consideration. The reasoning in the following cases tends to support this proposition. (*McChord* v. *Louisville & Nashville R. R. Co.*, 183 U. S. 483, 502; *New Orleans Waterworks Co.* v. *New Orleans*, 164 U. S. 471, 482; *Stone* v. *Farmer's Loan & Trust Co.*, 116 U. S. 307, 335; *C., B. & Q. Ry. Co.* v. *Winnett*, 162 Fed. 242, 248, 249; *First National Bank* v. *Albright*, 208 U. S. 548, 553.)

If, upon mere claim of want of jurisdiction, the Commission may be enjoined from proceeding with claims brought before it, great numbers of cases will be transferred, *in limine*, from the consideration of the Commission to trial in the courts, thereby greatly hampering the work of the Commission and congesting the dockets of the courts, both *nisi prius* and appellate.

The only other grounds of equitable relief alleged in the petition are multiplicity of suits and irreparable damages, both of which are untenable. Even if three suits at law, brought by the coal companies severally upon a separate and distinct cause of action, could be deemed a multiplicity of suits, and the cost of defending same, irreparable damages (which is all that is claimed by appellee), still the bill would be insufficient because the Commission has not as yet made, and indeed may never make, an award against appellee, and also because it is not alleged that the coal companies are threatening to bring such suits or

that they will not take advantage of section 16 of the act, which permits all parties in whose favor an award has been made to join in a single cause of action. Section 16 of the act provides, in part, as follows:

> In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, * * *. (C. 309, 36 Stat. 539, 554, sec. 13, par. 3, amending section 16 of the act.)

Apart from the above objections, the bill will not lie in this case because it seeks an injunction against the Commission, while acting in the capacity of a quasi-judicial body. (*Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479; *Baer Bros. Mercantile Co.* v. *Denver & Rio Grande Railroad Co.*, 233 U. S. 479.) It was, indeed, a statutory court of law for the trial of such claims, and its jurisdiction to entertain them was concurrent with that of other designated courts. This being true, only the parties to the proceedings before the Commission, the coal companies, and not the Commission itself could be enjoined.

> A writ of injunction is in no just sense a prohibition to those courts in the exercise of their jurisdiction. It is not addressed to those courts. It does not even affect to interfere with them. The process, when its object is to restrain proceedings at law, is

directed only to the parties. It neither assumes any superiority over the court, in which those proceedings are had, nor denies its jurisdiction. It is granted on the sole ground that from certain equitable circumstances, of which the court of equity, granting the process, has cognizance, it is against conscience, that the party inhibited should proceed in the cause. * * * (Story, Equity Jurisprudence, 12th ed., sec. 875. See, also, to the same effect, Spelling, Injunctions and other Extraordinary Remedies, 2d ed., sec. 40.)

III.

The Commission had jurisdiction to entertain the complaints of the coal companies.

The complaints of the three coal companies, in the cases pending before the Commission, prayed for damages on the ground that the railroad company had failed to furnish the coal companies with an adequate supply of "cars and transportation" (R., 11, 13), after reasonable request therefor. The complaints originally alleged "failure of defendant to distribute its available equipment upon a nondiscriminatory basis, but upon the argument the issues were narrowed to a consideration of the reasonableness of the car supply." (R., 21.)

Section 1 of the Act to Regulate Commerce, as amended, provides, in part:

> * * * the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or car-

> riage, * * *; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, * * *. (34 Stat., 584, c. 3591, sec. 1, 2d par.)

This court has construed the provisions of this section as imposing upon the carrier the duty to furnish cars upon reasonable request therefor.

> But this casts us back to our general considerations to which we may only add that there was no question of the duty of carriers either under the Act of 1887 or under the amendment of 1906. It was their duty under both to furnish the instrumentalities of transportation. (*United States* v. *Pennsylvania Railroad Co.*, 242 U. S. 208, 227.)
>
> Assuming that the conditions were normal and the demand reasonable, it was the duty of the carrier to have furnished the cars. That duty arose from the common law up to the date of the amendatory statute of 1906, known as the Hepburn Act, and thereafter from a provision in that act which, for present purposes, may be regarded as merely adopting the common-law rule. (*Pennsylvania Railroad Co.* v. *Sonman Shaft Coal Co.*, 242 U. S. 120, 125.) See also *Pennsylvania Railroad Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 132; *Chicago, Rock Island & Pacific Ry. Co.* v. *Hardwick*, 226 U. S. 426.

Under modern conditions, coal cars have become "common equipment" as distinguished from "special equipment," and it is the duty of the carrier to fur-

nish same upon reasonable request therefor. But however this may be, it appears from the pleadings that appellee failed to furnish an adequate supply of coal cars, and it does not appear that it offered to furnish any other kind of cars in lieu thereof. It is indisputable, therefore, that appellee has failed to comply with section 1 of the act.

By such failure to perform its duty to furnish transportation to the coal companies, appellee became liable to them under section 8 of the act (c. 104, 24 Stat. 379, 382) for all damages resulting therefrom.

> Not only is there then a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the Act to Regulate Commerce give remedies for the violation of that duty. Thus, by section 8 it is provided "That in case any common carrier subject to the provisions of this act * * * shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damage sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." (*Chicago, Rock Island & Pacific Ry.* v. *Hardwick Elevator Co.*, 226 U. S. 426, 434.) See also *Pennsylvania Railroad Co.* v. *Puritan Coal Company*, 237 U. S. 121; *Pennsylvania Railroad Co.* v.

Sonman Shaft Coal Co., 242 U. S. 120; *Eastern Railway Co.* v. *Littlefield*, 237 U. S. 140.

Section 9 of the act gives the injured party the option of going before the Commission or the courts for damages occasioned by violation of the statute. (*Mitchell Coal Co.* v. *Pennsylvania Railroad Co.*, 230 U. S. 247, 257; *Pennsylvania Railroad Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 128–129; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 438; *Pennsylvania Railroad Co.* v. *Sonman Shaft Coal Co.*, 242 U. S. 120, 123, 124; *Chicago, Rock Island & Pacific Ry. Co.* v. *Hardwick*, 226 U. S. 426, 435; *Pennsylvania Railroad Co.* v. *Clark Coal Co.*, 238 U. S., 456, 469. St. L. & I. M. R. R. Co. v. Ohio Valley Ry. Co. 288 F. 240.)

Section 9 of the act is, in part, as follows:

> That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. (Ch. 104, 24 Stat. 379, 382.)

Appellee argues that in all cases the jurisdiction of the courts and of the Commission is mutually ex-

clusive, citing the case of *Texas & Pacific Railroad Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. Such construction is wholly contrary to the above-cited decisions of this court, is not supported by the *Abilene* case, and would, if adopted, nullify the express provisions of section 9, which give the shipper the choice of one of the alternative remedies therein provided.

The present case differs entirely from *United States* v. *Pennsylvania Railroad Co.*, 242 U. S. 208. The latter involved the power of the Commission to require, by an affirmative order, a carrier to furnish a "special facility, a combination of package and car" (p. 229). This court held that while "there was no question of the duty of carriers either under the Act of 1887 or under the amendment of 1906" (p. 227) to furnish the instrumentalities of transportation, there was nothing in the act which gave the Commission power to require the carrier to furnish special equipment.

In the case at bar there is no question of the power of the Commission to require the railroads to enlarge its complement of cars or to furnish a particular kind of car, but only of its power to award damages under section 8 of the act for failure to comply with the statutory duty to furnish facilities of transportation upon reasonable request therefor. In the case of *Baer Bros. Mercantile Co.* v. *Denver & Rio Grande Railroad Co.*, 233 U. S. 479, this court recognized the similar distinction between the power

of the Commission to award reparation for damages arising out of the imposition of an unreasonable rate, and its lack of power, without express statutory authorization, to fix rates.

We submit that the Commission, in assuming jurisdiction over the complaints of the coal companies, was acting wholly within the authority expressly delegated to it, and that the district court erred in enjoining the Commission from performing duties clearly within the limits of its power.

CONCLUSION.

The decree of the district court should be reversed, the injunction against the Interstate Commerce Commission and its agents dissolved, and the bill dismissed.

Respectfully submitted.

E. MARVIN UNDERWOOD,
Assistant Attorney General.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

APRIL, 1917.

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